Supreme Court, U. S.
FILED
JAN 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- **1084**

BIRDIE MAE DAVIS, EDWIN FOSTER, and JAMES E. BUSKEY, et al.,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

ALFREDO G. PARRISH, et al.,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MICHAEL I. SOVERN
435 W. 116th Street
New York, New York 10027

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

J. E. BLACKSHER
Crawford, Blacksher & Kennedy
1407 Davis Avenue
Mobile, Alabama 36603

U. W. CLEMON
Adams, Baker & Clemon
2121 North Eighth Avenue
Birmingham, Alabama 35203

Attorneys for Petitioners

INDEX

PAGE

Opinions Below 1

1. *Davis* v. *Board of School Commissioners* 1
2. *Parrish* v. *Board of Bar Commissioners* 2

Jurisdiction 2

1. *Davis* v. *Board of School Commissioners* 2
2. *Parrish* v. *Board of Bar Commissioners* 2

Question Presented 3

Statutory Provisions Involved 3

Statement of the Case 5

A. *Davis* v. *Board of School Commissioners* 5

B. *Parrish* v. *Board of Bar Commissioners* 8

Reasons For Granting the Writ 9

Conclusion 19

Appendix—

Order of the District Court, *Davis* v. *Board of School Commissioners,* February 14, 1975 ..... 1a

Decision of the Court of Appeals, *Davis* v. *Board of School Commissioners,* August 21, 1975 ..... 5a

Order of the Court of Appeals Denying Rehearing, *Davis* v. *Board of School Commissioners,* October 2, 1975 ..... 15a

PAGE

Order of the District Court, *Parrish* v. *Board of Bar Commissioners,* March 23, 1973 ..... 17a

Decision of the Court of Appeals, *Parrish* v. *Board of Bar Commissioners,* December 2, 1974 ..... 19a

Decision of the Court of Appeals, *Parrish* v. *Board of Bar Commissioners,* December 4, 1975 ..... 36a

Decision of the District Court, *Robinson* v. *Union Carbide Corp.,* August 29, 1974 ..... 53a

TABLE OF AUTHORITIES

Cases:

Antonello v. Wunsch, 500 F.2d 1260 (10th Cir. 1974) 19n

Berger v. United States, 255 U.S. 22 (1921) 10, 14, 18, 19
Botts v. United States, 413 F.2d 41 (9th Cir. 1969) 18
Brown v. Board of Education, 347 U.S. 483 (1954) 6n

Commonwealth Castings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 11, 12

Davis v. Board of School Commissioners, 402 U.S. 33 (1971) 5

Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813) 16

Gallarelli v. United States, 260 F.2d 259, 261 (1st Cir. 1958) 19
Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974) 18

PAGE

In re Murchison, 349 U.S. 133 (1954) 16
In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961) 19

Johnson v. Mississippi, 403 U.S. 212 (1971) 14

Laird v. Tatum, 409 U.S. 824 (1972) 12, 16

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 14

NAACP v. Button, 371 U.S. 415 (1963) 6
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 6

Pfizer v. Lord, 456 F.2d 532 (8th Cir. 1972) 19
Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 10

Reveive Mining Co. v. Lord, —— F.2d —— (8th Cir. 1976) 14
Robinson v. Union Carbide Corp., 380 F.Supp. 731 (S.D.Ala. 1974) 6, 13

Tumey v. Ohio, 273 U.S. 510 (1927) 16

United States v. Bell, 351 F.2d 868 (6th Cir. 1965) 19
United States v. Ming, 466 F.2d 1000 (7th Cir. 1972) 18
United States v. Rosciano, 499 F.2d 173 (7th Cir. 1974) 18
United States v. Thompson, 479 F.2d 1072 (3d Cir. 1973) 18
United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 18

Whitaker v. McLean, 118 F.2d 596 (D.C.Cir. 1941) 19

Statutes:

28 U.S.C. § 144 .....3, 5, 6, 8, 10, 13, 14

PAGE

28 U.S.C. § 455 ..... 3, 4, 5, 9, 11, 12, 13, 14, 16, 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 7

42 U.S.C. § 1981 8

42 U.S.C. § 1983 8

1 Stat. 278 9

36 Stat. 1090 10

88 Stat. 1609 5

Pub. L. 93-512 11

Legislative Materials:

S. Rep. No. 93-419 (1973) 12, 17

H. R. Rep. 93-1453 (1974) 17

Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 1064, 93rd Cong., 1st Sess. (1973) 13

Hearings Before the Senate Judiciary Committee on Nominations to the United States Supreme Court, 92nd Cong., 1st Sess. (1971) 11, 17

Hearings Before the Senate Judiciary Committee on a Nomination to the United States Supreme Court, 91st Cong., 2d Sess. (1970) 11, 15

PAGE

115 Cong. Rec. 11

Other Authorities:

Federal Rules of Evidence, Rule 608 16

Rules of the Supreme Court, Rule 23(5) 2

Code of Judicial Conduct 12, 16, 17

Reporter's Notes to Code of Judicial Conduct (1973) ..12, 16

Shogan, A Question of Judgment (1972) 11

Frank, "Disqualification of Judges," 35 Law and Contemp. Probs 43 (1970) 11, 15, 16, 17

Frank, "Disqualification of Judges," 56 Yale L. J. 605, 628 (1947) 10

Note, 57 Minn. L. Rev. 749 (1973) 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

BIRDIE MAE DAVIS, EDWIN FOSTER,
and JAMES E. BUSKEY, et al.,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, et al.,

ALFREDO G. PARRISH, et al.,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE
ALABAMA STATE BAR, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 21, 1975, October 2, 1975, and December 4, 1975.

Opinions Below

1. ***Davis v. Board of School Commissioners***

The opinion of the court of appeals is reported at 517 F.2d 1044, and is reproduced in the Appendix at pp. 5a-

14a. The order of the court of appeals denying rehearing is reported at 517 F.2d 1044, and is reproduced in the Appendix at p. 15a. The order of the district court is unreported and is reproduced in the Appendix at pp. 1a-4a.

2. *Parrish v. Board of Bar Commissioners*

The opinion of the court of appeals *en banc* is reported at 524 F.2d 98, and is reproduced in the Appendix at pp. 36a-52a. The earlier opinion of the panel of the court of appeals is reported at 505 F.2d 12, and is reproduced in the Appendix at pp. 19a-35a. The order of the court of appeals withdrawing the panel opinion is reported at 509 F.2d 540. The order of the district court is unreported and is reproduced in the Appendix at pp. 17a-18a.

Jurisdiction

1. *Davis v. Board of School Commissioners*

The judgment of the court of appeals was entered on August 21, 1975; a timely petition for rehearing was denied on October 2, 1975. On December 23, 1975, Mr. Justice Powell signed an order extending the time for the filing of this petition until January 30, 1975 (No. A. 560). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

2. *Parrish v. Board of Bar Commissioners*

The judgment of the court of appeals sitting *en banc* was entered on December 4, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A single petition for a writ of certiorari seeking review in both cases is being filed pursuant to Rule 23(5) of this Court, since the issues raised by these cases are closely related.

Question Presented

Did the Court of Appeals apply the proper standards under 28 U.S.C. § 455 and 28 U.S.C. § 144 in holding that two federal district judges properly declined to recuse themselves?

Statutory Provisions Involved

Section 144, 28 U.S.C., provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455, 28 U.S.C., provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Prior to the 1974 amendment, 88 Stat. 1609, 28 U.S.C. § 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Statement of the Case

This petition seeks review of two decisions of the Fifth Circuit in which the standards for recusal of a district judge under 28 U.S.C. § 144 and the 1974 amendments to 28 U.S.C. § 455 were determined. The procedural history and facts of the two cases will be described separately.

A. *Davis v. Board of School Commissioners*

Davis is a school desegregation case originating in the Southern District of Alabama involving Mobile, Alabama. Following the decision of this Court in 1971, 402 U.S. 33, a desegregation plan was entered by stipulation of the parties. In 1974 petitioners Edwin Foster and James E. Buskey, both black assistant principals, were permitted to intervene in *Davis* to seek relief against alleged discrimination in promotions by the Mobile School Board.[1] Counsel

[1] See the Court of Appeals' decision at pp. 7a-8a.

for both intervenors was James U. Blacksher, also counsel for the original plaintiffs in the school desegregation case; his co-counsel are attorneys employed by the NAACP Legal Defense and Educational Fund, Inc., an organization whose main purpose is the support of litigation brought under the various civil rights acts and the Constitution to establish and enforce the rights of black citizens.[2] The judge to whom the case was then assigned was the Hon. William Brevard Hand.

On September 27 and November 20, 1974, respectively, petitioners Foster and Buskey filed essentially identical motions and affidavits pursuant to 28 U.S.C. § 144, seeking recusal of Judge Hand. The affidavits were based primarily on an opinion entered by Judge Hand one month earlier in an entirely different civil rights case in which Mr. Blacksher and the Legal Defense Fund attorneys were also involved, *Robinson* v. *Union Carbide Corp.*, 380 F.Supp. 731 (S.D. Ala. 1974). In *Robinson* aggressive private enforcement of public policies which "Congress considered of the highest priority," *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968), was condemned by Judge Hand as "perfidy". P. 56a. Concerted activity to vindicate through litigation the civil rights of blacks, accorded First Amendment protection by *NAACP* v. *Button,* 371 U.S. 415 (1963), was attacked by Judge Hand as a "tragedy" entailing "the destruction of the high quality of the legal profession." P. 57a. The affidavit of petitioner Foster and the relevant portions of the *Robinson* opinion are set out in the Appendix, pp. 13a-14a, 53a-57a. The affidavits alleged that Judge Hand had, through extra-judicial sources, formed the opinion that plaintiffs in civil rights actions

[2] See *NAACP* v. *Button,* 371 U.S. 415, 421, n. 5 (1963); the Legal Defense Fund has been involved in numerous cases before this Court, including *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

who were represented by Mr. Blacksher and/or Legal Defense Fund attorneys did not have valid grievances, but had been solicited by the attorneys to present unwarranted claims to further various unconscionable purposes of the attorneys. Judge Hand was thus alleged to be biased against petitioners Foster and Buskey and unwilling to judge their claims on the basis of the facts adduced at trial or the applicable law.

Judge Hand denied the motions, partly on the basis that, as a matter of fact, he was not biased. The district judge certified the question to the court of appeals under 28 U.S.C. § 1292(b), pp. 1a-4a, and the court granted petitions for leave to file interlocutory appeals. On August 21, 1975, a panel of the court of appeals affirmed Judge Hand's refusal to recuse himself on the ground that, regardless of whether the affidavits in fact demonstrated bias or the appearance of bias, the affidavits were legally insufficient. *First,* the court held that a party could not base recusal on actions taken or statements made by a judge in court, but could only rely on extra-judicial events. Since the evidence of Judge Hand's prejudice consisted of in-court statements, that evidence was subject to the court's exclusionary rule, even though the statements relied upon occurred in an entirely separate case. *Second,* the court held that evidence of bias or prejudice directed at a party's lawyers also could not be considered, and since the evidence itself was inadmissible it could not be relied upon to infer that a judge implacably hostile to an attorney might, for that reason, be or appear to be less than fair to his clients. Pp. 9a-13a. A timely petition for rehearing was denied on October 2, 1975.

B. *Parrish v. Board of Bar Commissioners*

Parrish is an action brought under 42 U.S.C. §§ 1981 and 1983, charging that the Board of Examiners of the Alabama State Bar, its members and officials, had, both intentionally and because of the effect of bar examinations and their method of administration, discriminated against black applicants for admission to the bar. The case arose in the Middle District of Alabama and was assigned to Judge Robert E. Varner.

During the preliminary phases of the litigation questions arose concerning Judge Varner's impartiality; to clarify the matter Judge Varner submitted to questions by counsel for plaintiff at a hearing held for this purpose. Appendix pp. 24a-25a. In that testimony Judge Varner acknowledged his personal friendship with most of the defendants, and his confidence in the veracity and integrity of key defense witnesses. Promptly after this hearing plaintiffs filed a motion and affidavit under 28 U.S.C. § 144 to recuse Judge Varner. Plaintiffs urged, *inter alia,* that both Judge Varner's recent leadership role in a bar association that excluded blacks, and his preconceived and extra-judicial belief in the veracity of defendants in a case where their credibility as to intentional discrimination would be a major issue, required that he disqualify himself.

The District Judge declined to recuse himself. Shortly thereafter he granted defendants' motion for summary judgment. Plaintiffs' claim that the defendants had engaged in intentional racial discrimination in administering the state bar examination was denied on the ground, *inter alia,* that the defendants had submitted conclusory affidavits denying it. An appeal from the final order granting summary judgment and dismissing the complaint was taken, and the recusal question was one of the issues presented on appeal.

On December 12, 1974, a panel of the Fifth Circuit (Judges Tuttle, Wisdom, and Gee), reversed the refusal of Judge Varner to recuse himself in *Parrish.* Appendix, pp. 19a-35a. On February 20, 1975, the court of appeals *sua sponte* withdrew its opinion, 509 F.2d 540; on June 5, 1975, it informed the parties that it had, also *sua sponte,* decided to hear *Parrish en banc,* and invited the parties to file additional briefs.[3] On December 4, 1975, the court issued its *en banc* decision in *Parrish.* The majority opinion written by Judge Bell, the author of the panel decision in *Davis,* concluded that neither § 144 nor § 455 required recusal.[4] Four judges concurred specially and three dissented. Pp. 36a-52a.

Reasons for Granting the Writ

This case arises out of the most recent attempt by Congress to tighten the standards as to when a federal judge must recuse himself from a case.

The first such statute, adopted in 1792 to overcome the manifest inadequacy of the common law regarding recusal, authorized disqualification on a number of specified grounds.[5] The succeeding versions of this provision existed until 1974 as 28 U.S.C. § 455. Over the years the lower courts so narrowed the applicability of these enumerated grounds,[6] so broadened the discretion of judges in

---

[3] The case was not set for reargument *en banc.*

[4] Section 3 of the Act amending § 455 provides that the amendments apply to any appeal which had not been fully submitted to the appellate court prior to December 5, 1974. Briefs were filed in both *Parrish* and *Davis* subsequent to that date. See p. 41a.

[5] 1 Stat. 278.

[6] Note, 57 Minn. L.Rev. 749, 752 (1973).

applying the statute,[7] as to render the statute largely ineffective.

This process of emasculation led Congress to adopt in 1911 the provisions now codified as 28 U.S.C. § 144.[8] Section 144 provides that a judge must disqualify himself upon the filing of an affidavit by the party stating that he believes the judge to be biased or prejudiced and stating the reasons for the affiant's belief. In 1921 this Court handed down its only construction of section 144 in *Berger* v. *United States,* 255 U.S. 22 (1921), which directed that a judge with a firm belief in the disloyalty of German emigrants disqualify himself from presiding at a trial of German-Americans charged with espionage. This Court, reading section 144 literally and in light of its legislative purpose, held that the "facts and reasons" in the required affidavit need not prove the judge was in fact biased, but need only have a reasonable relation to the affiant's belief and be neither "frivolous [n]or fanciful". 225 U.S. at 33-34. The policy underlying the statute was stated to be "that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." 255 U.S. at 35-36. In *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 466-67 (1952) Mr. Justice Frankfurter disqualified himself out of a concern "that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." In 1968 this Court concluded that, as a matter of "constitutional principle", "any tribunal permitted by law to try

[7] Frank, "Disqualification of Judges", 56 Yale L.J. 605, 628 (1947).

[8] The congressional debates leading to the enactment of section 144, 36 Stat. 1090, were expressly directed at the defects of section 455 as it then existed.

cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145, 150 (1968). In the lower courts, however, the efficacy of section 144 was steadily eroded by a series of judicially fashioned exceptions and technicalities and an increasingly open refusal to adhere to the standard set in *Berger* itself.[9]

The most recent legislation, Pub. L. 93-512, which is the subject of this petition, arose out of a series of controversies regarding actual or proposed members of this Court.[10] In the course of that controversy the American Bar Association in 1969 appointed a committee to review generally the standards of judicial conduct.[11] In June, 1970, the ABA committee circulated a draft Standards of Judicial Conduct which, with regard to recusal, expanded the specific categories of situations requiring disqualification. In July legislation was proposed in the Senate to modify section 455 by incorporating a similar enumeration, but adding a broadly worded provision requiring disqualification in any case where participation would "create an appearance of impropriety."[12] In the

[9] See p. 46a; Note, 57 Minn. L.Rev. 749, 755 (1973).

[10] See Shogan, A Question of Judgment (1972); 115 Cong. Rec. 34049, 34268, 34275, 34287, 34375, 34425, 34432, 34450, 34553, 34597, 34825, 34843, 34861, 35120, 35130, 35368, 35395, (1969); S. Exec. Rep. No. 91-92, 91st Cong., 1st Sess. (1969); Frank, "Disqualification of Judges," 35 Law and Contemp. Probs. 43, 60-61 (1970); Hearings Before the Senate Judiciary Committee on a Nomination to the United States Supreme Court, 91st Cong., 2d Sess., 41, 49-50 (1970); Hearings Before the Senate Judiciary Committee on Nominations to the United States Supreme Court, 92nd Cong., 1st Sess., 49-50, 60-61, 73-74, 203-05 (1971).

[11] Frank, "Disqualification of Judges", 35 Law and Contemp. Probs 43, 62 (1970).

[12] *Id.,* 63, 68.

ensuing debate within the ABA committee the Senate proposal for such a catch-all clause was accepted, and Canon 3C(1) prefaced the enumeration of specific circumstances requiring disqualification with the words "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: . . . ." The Reporter's Notes relied on *Commonwealth Castings,* and stressed that "Although the specific standards cover most of the situations in which disqualification will arise, the general standard should not be overlooked." [13] The new Canons were adopted by the ABA in 1972, and by the Judicial Conference of the United States in April 1973. Legislative proposals by various Senators resulted, in December, 1974, in the adoption of a comprehensive new version of section 455 which is substantially identical to Canon 3C, except for the addition of subsection (b)(3) which deals with the recusal problem discussed in *Laird* v. *Tatum,* 409 U.S. 824 (1972).[14] Section 455(a) contains the broad language sought since 1970 by the Senate sponsors requiring a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questoned." [15]

Parrish and *Davis* are the first decisions construing and applying section 455. In both cases the issue of recusal arose at a preliminary stage when an appellate decision in favor of recusal would not require a retrial, and in both instances, of course, there were available to hear the case other federal judges whose background would not raise the troublesome question posed by Judges Varner and

[13] Reporter's Notes to Code of Judicial Conduct, 60 (1973).

[14] See S.Rep. No. 93-419, p. 6 (1973).

[15] See *id.*, p. 5.

Hand. Petitioners maintain that the decisions of the court of appeals have, within a year of its adoption, virtually nullified the new section 455.

Section 455 was intended to overcome the problems which had rendered section 144 ineffective by adopting in subsection (a) a broad disqualification requirement with absolutely no limitations as to type of potential bias, source of potential bias, or procedure. The Senate sponsor urged that section 455 was necessary because "No statute creates more distrust than does the section 144 procedure for disqualification".[16] *Davis* overcomes this legislative plan by the simple expedient of expressly reading into section 455 every limitation it believes existed under section 144. The indisputable evidence in *Davis* reveals that Judge Hand in the *Robinson* case expressed implacable hostility to civil rights litigants represented by Mr. Blacksher and Legal Defense Fund attorneys, characterizing their efforts to enforce federal civil rights laws as "perfidy". Pp. 56a-57a. Plaintiffs in the *Davis* case filed a detailed affidavit documenting the reasons for their belief that Judge Hand regarded them and all other parties represented by Blacksher as having grievances that were invalid and unwarranted. Pp. 13a-14a. It cannot be seriously questioned that, in the literal terms of that statute, a reasonable man could doubt the impartiality of Judge Hand in civil rights cases handled by Mr. Blacksher and his associates. The Fifth Circuit avoided this otherwise inescapable conclusion by holding that none of the evidence on which petitioners rely is legally "available."

The court of appeals adopted from its reading of section 144 case law two distinct exclusionary rules prohibiting consideration of evidence that a judge is prejudiced against a party's counsel or of evidence coming to light in,

[16] Hearings Before a Subcommittee of the Senate Judiciary Committee on S.1064, 93rd Cong., 1st Sess., 13 (1973).

or of prejudice due to events in, any judicial proceeding. The court did not deny that a reasonable man could sensibly not fear that a judge would vent his hostility towards a lawyer on the lawyer's clients, or that reasonable men in assessing a judge's impartiality would consider how the judge conducted himself in court. The court of appeals reasoned, rather, that the Congress which repealed the old section 455 and regarded section 144 as ineffective intended to apply to the new section 455 the gloss which some lower courts had used to debilitate section 144. Nothing in the language or legislative history of section 455(a) suggests any such congressional intent to so emasculate that statute. Moreover, the Fifth Circuit's conclusion that such evidence was inadmissible prior to section 455 is inconsistent with this Court's decisions in *Berger,* which involved evidence of prejudice arising in judicial proceeding, and *Johnson* v. *Mississippi,* 403 U.S. 212, 215 (1971), which relied heavily on evidence that the judge in that case was prejudiced against a party's attorney. See also *Mayberry* v. *Pennsylvania,* 400 U.S. 453 (1971); *Reserve Mining Co.* v. *Lord,* —— F.2d —— (8th Cir. 1976).

In *Parrish,* unlike *Davis,* the court of appeals held the evidence adduced was admissible, but applied a standard as to when impartiality can be questioned so high that it cannot be met in virtually any conceivable case. The request for recusal in *Parrish* is grounded upon five factors, any one of which should be sufficient to require a judge to step aside. First, the judge candidly conceded his belief that the key defense witness, the Secretary of the Commission, a close personal friend of the judge, would not lie.[17] Second, the judge was admittedly a close per-

[17] "I think Mr. Scott is an honorable man .... I think he would try to tell you the truth in his answers." Transcript of Hearing of December 22, 1972, p. 21. The testimony of Scott is critical to the issue of whether the Commissioners could have known the race of the applicants whose tests they were grading.

sonal friend of two of the defendants, and acquainted with at least 7 of the other defendants, but did not know any of the plaintiffs.[18] Third, since the judge was a member of the defendant Bar Association, which is dependent for its funds on assessments of its members, he faced indirect personal liability for any costs, counsel fees or damages that might be awarded to plaintiffs. P. 43a. Fourth, there were serious questions as to whether the judge had, only a few years earlier, supported or condoned racial discrimination by the Montgomery County Bar Association similar to that alleged to have been practiced by the state bar association. Pp. 43a, 49a. Fifth, the attorney who represents the defendants in this case is also representing Judge Varner in connection with an investigation of the conduct of Judge Varner in an unrelated case.[19] The *en banc* majority in *Parrish* concluded that, despite this extraordinary combination of circumstances, a reasonable man could not reasonably question Judge Varner's impartiality. P. 42a.

If there was ever a period in American jurisprudence when reasonable men would not doubt the fairness of a judge in such a case,[20] "the times have changed".[21] Past

[18] *Id.,* pp. 6, 8, 20-21.

[19] This circumstance arose while *Parrish* was pending on appeal and bears on whether Judge Varner should sit when the case is remanded for further proceedings.

[20] Admittedly the standards were rather lax in the eighteenth century. See Frank, "Disqualification of Judges", 35 Law and Contemp. Probs 43, 44 (1970).

[21] Hearings Before the Senate Judiciary Committee on a Nomination to the United States Supreme Court, 91st Cong., 2d Sess., 41 (1970). (Statement of Mr. Justice Blackmun) Regarding the "evolving standards" as to when a judge should withdraw from a case, Mr. Justice Blackmun reiterated "I think the times have changed a great deal in the past 5 years and I would not say for the worse by any means."

practice in this Court suggests that no member of the Court would participate in a decision in this case if he bore the same relationship to the defendants, the defense witnesses, and the defendants' attorney as did Judge Varner. The district judge's personal knowledge of the veracity of the key defense witnesses would doubtless render him an ideal character witness,[22] but section 455(b)(1) forbids a judge from sitting in any case where he has such "personal knowledge of disputed evidentiary facts." Compare *Laird* v. *Tatum,* 409 U.S. 824, 826-7 (1972) (Rhenquist, J.).[23] As a member of the defendant Bar Association the judge also has financial "interest that could be substantially affected by the outcome of the proceeding." Section 455(b)(2).[24] Compare *Fairfax's Devisee* v. *Hunter's Lessee,* 11 U.S. (7 Cranch) 603 (1813).[25] For Judge Varner to sit in a case where his personal lawyer represented one of the parties would be to raise the same type of question of possible bias as would exist if he heard a case in which his

[22] Federal Rules of Evidence, Rule 608. Of course Canon 2 forbids a judge from testifying voluntarily as a character witness. See Reporter's Notes to Code of Judical Conduct, p. 49 (1973). It would be incongruous, to say the least, if the Canons forbade a judge from being a voluntary witness in such a case but did not preclude him from volunteering to adjudicate it.

[23] This rule is constitutionally required. *In re Murchison,* 349 U.S. 133, 138 (1954), forbade a judge who had sat as a one-man grand jury from trying a prosecution for contempt because he had "personal knowledge and impression of what occurred in the grand jury room."

[24] This may not constitute a "financial interest" within the meaning of section 455(d)(4), but section 455(b)(4) includes not only financial interests but "any other interest", a category expressly intended to have "a broad sweep". Reporter's Notes To Code of Judicial Conduct, 66 (1973).

[25] Regarding the nature of Chief Justice Marshall's interest see Frank, "Disqualification of Judges", 35 Law and Contemp. Probs. 43, 45 (1970). This rule is also constitutionally mandated. *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

son was of counsel.[26] The partiality of any judge would clearly subject to question in a case in which one of the parties, or a victim of the crime involved, was a personal friend.

It is difficult to believe that the draftsmen of the amended section 455 would have been less than astonished at the suggestion that, after five years of congressional debate and the enactment of the most sweeping recusal statute in the history of the federal courts, Judges Varner and Hand could still sit in these cases. In the face of the decisions below section 455 is virtually a dead letter in the Fifth Circuit. *Davis* is likely to exclude most relevant evidence of potential bias, and whatever is admissible is likely to be less persuasive than the facts in *Parrish.* This Court should not permit a salutary enactment designed to substantially broaden the circumstances requiring recusal to be so nullified in less than a year after it enactment by Congress.

In amending section 455 Congress was concerned with more than the rights and interests of particular litigants. The disputes regarding nominations to this Court reflected a conviction that it is "quite important for the public to have confidence in the members of the Court that they have no interest other than to do justice under law."[27] Both the House and Senate reports stressed that general language of the new section 455 was "designed to promote public confidence in the impartiality of the judicial process."[28] See Code of Judicial Conduct, Canon 2 (A).[29] The

[26] The evolving standard applied by members of this Court in that situation is discussed in Frank, "Disqualification of Judges", 35 Law and Contemp. Probs. 43, 46-48 (1970).

[27] Hearings Before the Senate Judiciary Committee on Nominations to the United States Supreme Court, 92nd Cong., 1st Sess., 204 (1971) (Statement of Mr. Justice Powell).

[28] S. Rep. No. 93-419, 5 (1973); H.R. Rep. 93-1453, p. 5 (1974).

[29] "A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

willingness of disputing parties to submit their disagreements to the judiciary for resolution, to cooperate with and facilitate the established judicial procedures, and to acquiesce in the conclusions reached by those tribunals, depends above all on their belief that the judges will act impartially. It is for this reason that the effective administration of justice requires of all judges who may hear a case that they "be fair and that they appear to be fair—to the [parties], to those who are deeply interested in [their] future, and to the public at large." *United States* v. *Rosciano,* 499 F.2d 173, 175 (7th Cir. 1974) (Stevens, J., dissenting). To permit Judges Hand and Varner to continue to sit in these cases would be inimical to the public confidence which Congress was intent upon restoring.

The decisions below are also squarely inconsistent with this Court's decision in *Berger. Berger* held that an affidavit would be sufficient for purposes of section 144 if the facts alleged provide a reasonable basis for the affiant's belief that the judge is prejudiced against him. 255 U.S. at 33-34. The dissenters in the *Parrish, en banc* decision, who were the original majority in the panel decision, expressly adhered to this "subjective" standard. Pp. 31a-35a. The panel in *Davis* and the *en banc* majority in *Parrish* insisted that the affidavit must demonstrate that the judge is in fact biased. Pp. 10a-12a, 40a. Judge Gee, specially concurring in *Parrish,* attacked *Berger* as "an outdated rule", expressed his conviction that this Court would decide *Berger* otherwise today, and urged the court of appeals to openly disregard that decision. Pp. 44a-47a. As of now the circuits are divided on whether *Berger* is still good law. Four circuits adhere to *Berger,* holding an affidavit sufficient if it gives fair support to the affiant's belief,[30] four

[30] *United States* v. *Tropiano,* 418 F.2d 1069, 1077 (2d Cir. 1969); *United States* v. *Thompson,* 479 F.2d 1072, 1073-74 (3d Cir. 1973); *Government of Virgin Islands* v. *Gereau,* 502 F.2d 914, 932 (3d Cir. 1974); *United States* v. *Ming,* 466 F.2d 1000, 1004 (7th Cir. 1972); *Botts* v. *United States,* 413 F.2d 41 (9th Cir. 1969).

circuits, including the Fifth, now require the affidavit to prove prejudice in fact,[31] and two circuits, while rephrasing *Berger,* have nonetheless rejected any requirement that bias be proven.[32] This broad conflict as to the vitality of *Berger* is sufficient, in and of itself, to require a grant of certiorari.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Fifth Circuit.

Respectfully submitted,

MICHAEL I. SOVERN
435 W. 116th Street
New York, New York 10027

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

J. E. BLACKSHER
Crawford, Blacksher & Kennedy
1407 Davis Avenue
Mobile, Alabama 36603

U. W. CLEMON
Adams, Baker & Clemon
2121 North Eighth Avenue
Birmingham, Alabama 35203

Attorneys for Petitioners

[31] *United States* v. *Bell,* 351 F.2d 868, 879 (6th Cir. 1965); *Pfizer* v. *Lord,* 456 F.2d 532, 537 (8th Cir. 1972); *Antonello* v. *Wunsch,* 500 F.2d 1260 (10th Cir. 1974).

[32] *In re Union Leader Corp.,* 292 F.2d 381, 389 (1st Cir. 1961); *Gallarelli* v. *United States,* 260 F.2d 259, 261 (1st Cir. 1958); *Whitaker* v. *McLean,* 118 F.2d 596 (D.C. Cir. 1941).

APPENDIX

Order of the District Court, February 13, 1975

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

Civil Action No. 3003-63-H

BIRDIE MAE DAVIS, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

EDWIN FOSTER,

Plaintiff-Intervenor,

JAMES E. BUSKEY,

Plaintiff-Intervenor,

vs.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

Defendants.

ORDER

Plaintiff-Intervenor, James E. Buskey, having filed an affidavit pursuant to the provisions of 28 U.S.C. §144 for the Judge to recuse himself from further proceeding in

or presiding over any aspect of this trial and the Court having considered the same in light of what the Court understands to be the law as set forth in *Parrish* v. *Board of Commissioners of Alabama State Bar*, Court of Appeals Case #73-3553, #74-1523, DENIES the same and certifies this issue to the Court of Appeals pursuant to the provisions of 28 U.S.C., §1292(b).

As this Court interprets the opinion of the Court of Appeals in *Parrish*, supra, when an affidavit such as is found herein is made, there is imposed upon the Judge the duty of determining whether or not that affidavit is as required and specified by the statute and is legally sufficient. As this Court understands the test, it is whether the facts alleged could reasonably lead to the belief by the affiant that what the affidavit says exists did in fact exist in the mind of the affiant.

In support of the affidavit, affiant attached a copy of this Judge's opinion in the case of *Robinson* v. *Union Carbide*, Civil Action No. 7583-73-H, a case now on appeal to the Court of Appeals, and one of the Court's rulings rendered in *Birdie Mae Davis, et al.* v. *Board of School Commissioners, etc., et al.*, Civil Action No. 3003-63-H entered on August 16, 1974, which incidentally is also now part of the an appeal to the Court of Appeals.[1] The affidavit states that affiant, upon request of his counsel, read the aforementioned opinion and order and came to his conclusion as a result thereof. No where does it appear in the affidavit or statement that counsel for affiant furnished or offered him a copy of the transcript forming the factual basis for the opinion in *Union Carbide* nor the related petitions and orders constituting the

[1] Civil Action #74-8484.

basis of this Court's Order of August 16, 1974 in *Birdie Mae Davis*. Such selectivity of evidence has been used through the ages to produce desired results envisioned by the motivating force or at least this was so until the adoption of the Constitution and the Bill of Rights of the United States.

Among other conclusions drawn by affiant in his affidavit is that, "In particular Judge Hand is biased and prejudiced against anyone or any group of persons • • • presenting • • • claims through attorneys employed by/or associated with the NAACP Legal Defense and Educational Fund, Inc. • • • etc.", and concluded members of his race could not fare well before him. By admission, counsel furnished only two selected matters and ignored providing affiant with opinions where members of his race fared fairly, where the judgments were the result of consent decrees, and where some of the parties were represented by the Legal Defense and Educational Fund, Inc. along with their associated counsel. (See attached Exhibits A, B, C, D, E, F, & G.) Though there are others this Order will not be burdened by the same, save to refer to the fact that the Order represented by Exhibit G. was appealed to the Court of Appeals and affirmed. Other instances where members of the Black race, the race of Mr. Buskey, have appeared before this Court and were apparently treated fairly are reflected by the files of this Court and are open for the public's review as it and affiant sees fit to review them.

The Court does not consider that the affidavit and the certification by counsel is legally sufficient within the meaning of the law. However, this Judge does not feel that he should be the final word on the question of his possible bias or bent of mind or passion or prejudice or

on the question of his ethics and is thus willing to resign the final decision in this to the Almighty, posterity and the Court of Appeals for the Fifth Circuit and is more than happy to start with the Court of Appeals.

Forthe reasons expressed herein, the affidavit requesting this Judge to recuse himself is hereby DENIED and the cause certified to the Court of Appeals pursuant to 28 U.S.C., §1292(b).

DONE this 13th day of February, 1975.

W. B. HAND
United States District Judge

A note should be made of Canon 8 (E.C. 8-6) and Canon 1 of the Code of Professional Responsibility adopted by the American Bar Association August 12, 1969 and effective January 1, 1970.

Opinion of the Court of Appeals, August 21, 1975

United States Court of Appeals,
Fifth Circuit.

Nos. 74-3894, 75-1312, 74-4257
and 75-1827.

Aug. 21, 1975.

Birdie Mae DAVIS et al., Plaintiffs-Appellants, United States of America, Plaintiff-Intervenor, Edwin Foster, Plaintiff-Intervenor,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY et al., Defendants-Appellees.

James E. BUSKEY et al., Plaintiffs-Appellants,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY et al., Defendants-Appellees.

Birdie Mae DAVIS et al., Plaintiffs, United States of America, Plaintiff-Intervenor, James E. Buskey, Plaintiff-Intervenor-Appellant,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY et al., Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge:

This is the thirteenth appeal in the Mobile school case (Mobile XIII), which case began in 1963.[1] The questions presented are illustrative of problems encountered in winding down a school case. Some are important to the administration of final school desegregation decree. One centers on an effort to disqualify the district judge. The questions arise out of four separate appeals which we have consolidated.

The district court entered a consent order on July 9, 1971 adopting a "Comprehensive Plan for a Unitary School System" as formulated by the parties. That plan, and the district

1. *See Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883, 885 n. 1 (5th Cir. 1970) (*Mobile IX*) for citations to earlier appeals. *See also Davis v. Board of School Commissioners of Mobile County*, 483 F.2d 1017 (5th Cir. 1973) (*Mobile X*); *National Education Assn. v. Board of School Commissioners of Mobile County*, 483 F.2d 1022 (5th Cir. 1973) (*Mobile XI*); *Davis v. Board of School Commissioners of Mobile County*, 496 F.2d 1181 (5th Cir. 1974) (*Mobile XII*).

court consent order thereon, adopted the following requirement of *Singleton v. Jackson Municipal Separate School District*, 5 Cir. (en banc), 1970, 419 F.2d 1211:

> "Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin."

See also Carter v. West Feliciana Parish School Board, 5 Cir., 1970, 432 F.2d 875.

Jurisdiction of the district court continued over the matter as a class action. Meanwhile, this court held that the proper and orderly procedure to be followed by third parties in seeking to question deficiencies in the implementation of desegregation orders or for further relief in ongoing school cases is by petition to intervene. *See Hines v. Rapides Parish School Board*, 5 Cir., 1973, 479 F.2d 762; *Lee v. Macon County Board of Education (Conecuh County)*, 5 Cir., 1973, 482 F.2d 1253. Thereafter in *Mobile XI*, we rejected the effort of the National Education Association to superimpose a class action on behalf of the black school administrators and teachers in the system on the pending class action. *National Education Association, supra*, n. 1, 483 F.2d 1022 (*NEA*). In doing so, we pointed to our prior decisions which required any complaint of discrimination within the scope of a pending school suit to be advanced by petition to intervene in that case.

I.

Undaunted by these decisions, counsel for the plaintiffs here proceeded to file two new class actions. One was filed on behalf of Edwin Foster, a black assistant school principal, and another on behalf of James E. Buskey, also a black assistant school principal. Each claimed discrimination in having been denied promotion to principal. The district court dismissed each suit with leave to intervene in *Birdie Mae Davis*. Each thereafter intervened but Buskey appeals nevertheless from the order of dismissal. This is No. 74–4257.

Two of the appeals are interlocutory and are brought under 28 U.S.C.A. § 1292(b). These are Nos. 75–1312 and 75–1827.[2] The appeals are from orders denying the motions of Foster and Buskey, respectively, to disqualify the district judge for bias under 28 U.S.C.A. § 144.[3]

The other appeal, No. 74–3894, is by the original class in *Birdie Mae Davis* from an order of the district court refusing to issue an order to show cause why the defendant school board should not be held in contempt for failure to comply with the desegregation consent order relative to professional promotions.

As will be seen, we find no merit in these appeals and affirm as to each. We do give some direction to the district court with respect to the range of discovery to be allowed in the further proceedings in the Foster and Buskey cases on remand.[4] It is to be remembered that only their claims of discrimination

2. No. 75–1312 was numbered as No. 74–8484 prior to our allowing the interlocutory appeal. No. 75–1827 was No. 75–8063 before being allowed.

3. Buskey filed an identical motion but has not appealed. Ir the circumstances, one appeal will suffice to settle the question presented.

4. The discovery problem came up as a part of the Foster interlocutory appeal allowed from the denial of the motion to disqualify the district judge.

in the refusal to promote them to the position of school principal are pending for resolution on the merits. All other matters before us are part of a procedural tangle.

II.

A brief chronology of the procedural events will assist in understanding our disposition of the several issues.

(A) The Foster suit, filed on January 25, 1974 as a "Complaint in Intervention", sought to maintain a class action consisting of "black persons holding degrees in Administration and Supervision who have been passed over for promotion solely by reason of their race and color". This complaint followed an earlier independent suit by Foster, filed October 5, 1973, which had been dismissed on the authority of *NEA, supra*, with leave being granted for him to intervene in the *Birdie Mae Davis* case.

(B) Interrogatories were served on March 15, 1974 by Mr. Foster on the school superintendent in an effort to develop detailed facts with respect to principals and assistant principals as well as the entire administrative and supervisory force of the Mobile school system.

(C) The district court set the matter for class action determination on February 22, 1974. No basis for maintaining such an action having been offered, the court entered an order on March 25, 1974 that the matter could not be maintained as a class action.

(D) On July 2, 1974, counsel for Foster moved to compel answers to the earlier filed interrogatories. A magistrate entered an order on July 8, 1974 requiring that the interrogatories be answered. Defendants moved for reconsideration and the district court, on July 15, 1974, entered an order denying the motion to compel answers with leave to Foster to file interrogatories germane to his complaint.

(E) There were two filings on July 19, 1974. The same interrogatories were served on the school superintendent on behalf of the *Birdie Mae Davis* class in the underlying suit by co-counsel for Foster (who, coincidentally, was one of counsel for the plaintiffs in *Birdie Mae Davis* and had only recently joined the Foster case as co-counsel for Foster). In addition, Foster moved for reconsideration of the order of July 15, 1974.

(F) On July 31, 1974, defendants moved for a protective order as to the *Birdie Mae Davis* interrogatories. On the same day, the district court entered an order denying the motion of Foster for reconsideration, and recited, as a basis for the order, that the court had not been made aware to date of any claim of discrimination other than the Foster claim. (It appears that the Buskey suit, hereafter discussed, had been filed on July 12, 1974. It was filed by co-counsel, also as a separate suit rather than as an intervention, and sought to maintain a class action on behalf of "all past, present and future Negro professional employees" of the school system.)

(G) On August 8, 1974, co-counsel for Foster, who is, as stated, one of the lawyers representing the *Birdie Mae Davis* class, attempted to reopen the *Birdie Mae Davis* case through the vehicle of a motion for an order to show cause why the defendants, collectively and separately, should not be held in contempt for failure to comply with that part of the earlier consent order of the court requiring appointment of the professional staff without regard to race or color. The motion was based on the Foster and Buskey claims.

(H) On August 16, 1974, the district court granted the motion of defendants

for a protective order as to the *Birdie Mae Davis* interrogatories, and denied the motion for an order to show cause in that case.

(I) On August 23, 1974, counsel moved for reconsideration of the August 16, 1974 order entered in the *Birdie Mae Davis* phase of the litigation, or in the alternative that it be amended to strike therefrom statements which reflected on counsel with regard to his efforts and motive in seeking to avoid the class action and discovery orders in Foster by his use of the *Birdie Mae Davis* case.

This motion for reconsideration and to strike was supported by an affidavit from counsel in which he asserted that as attorney for the *Birdie Mae Davis* class, he had the solemn duty to insure that the consent order was being carried out and that he was, in effect, monitoring compliance with that order. He regarded the Foster and Buskey claims as establishing a need for monitoring.

(J) On September 20, 1974, the district court denied the motion for reconsideration and to strike. Notice of appeal from this order was filed on October 18, 1974. (No. 74–3894.)

(K) On September 27, 1974, the district court denied the motion of the school board for summary judgment in the Foster intervention.

(L) On the same day, Mr. Foster filed a motion under 28 U.S.C.A. § 144, supported by affidavit, to disqualify Judge Hand from his case on the basis that Judge Hand had "a personal bias or prejudice" against Foster and "other black parents, school children and school teachers in the Mobile school system as members of the plaintiff class". A copy of the affidavit is appended to this opinion and marked "A". The affidavit makes it clear that Foster's affidavit is based on his reading, at the request of his counsel, of an opinion of the same district judge rendered on August 29, 1974 in another case in which counsel appeared. *Robinson v. Union Carbide Corporation*, S.D. Ala., 1974, 380 F.Supp. 731. Judge Hand denied the motion but allowed an interlocutory appeal. (This is No. 75–1312.)

(M) The Buskey suit was dismissed on October 3, 1974, with leave to intervene in *Birdie Mae Davis*. Notice of appeal was filed on November 1, 1974. (This is No. 74–4257.)

(N) On November 20, 1974, Buskey filed a motion and affidavit *in haec verba* to Foster's, to disqualify the district judge. The order denying this motion gave rise to the interlocutory appeal, No. 75–1827.

III.

NO. 74–4257

As stated, only Buskey has appealed from the order requiring intervention rather than being allowed to proceed with a separate suit. It is apparent, however, that our decisions requiring such a procedural approach were the genesis of the overall controversy which has arisen between counsel and the district court. It will be well, therefore, to consider this particular appeal as a first issue.

Buskey seeks to avoid our holdings of required intervention, *supra*, on the theory that his claim is asserted under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., § 2000e–5, in addition to being based on 42 U.S.C.A., §§ 1981 and 1983, and the consent decree. This theory is without merit.

Intervention would not result in the loss of substantive or procedural rights under Title VII. It will result in better management of the pending *Birdie Mae Davis* class action. It will enable the district court to consider Buskey's Title VII rights alone, as well as in conjunction with rights which may be due him under other statutes and under the consent order. Intervention will serve to avoid a proliferation of litigation over the same subject matter, and is within the spirit of Rule 24(b), F.R.Civ.P.[5] The same reasoning, which supported our prior decisions requiring intervention, is supportive of requiring that a Title VII plaintiff-school employee likewise intervene. Lastly, our policy of required intervention is analogous to the discretionary power in the court to require consolidation. *See* Rule 42(a), F.R.Civ.P.[6]

In the nature of a fallback position, Buskey urges that at least his case should have been consolidated with the *Birdie Mae Davis* case. The difference between consolidation and intervention in the context of this type proceeding is semantical in nature—with any difference being gossamer. As an intervenor, Buskey will be entitled to the full panoply of Title VII law as it has developed since the passage of the Act in 1964.

This means that both the Foster and Buskey suits are pending in intervention and are awaiting trial. This fact points to the importance of disposing of the interlocutory appeals which were allowed to determine the validity of the orders denying disqualification under § 144, *supra*.

NOS. 75–1312 AND 75–1827

The separate motions of Foster and Buskey to disqualify Judge Hand and the supporting affidavits will be considered as one matter. The affidavits rest on facts brought to the attention of affiants by their counsel. In the main, the claim of bias centers on problems of counsel (Mr. Blacksher), in this litigation, and in *Union Carbide Corporation, supra*, where Judge Hand was of the opinion that overtones of barratry and champerty were present. An appeal in that case is pending in this court. No. 75–1008—*Robinson v. Union Carbide Corporation*. That opinion speaks for itself. Whether the district court was in error in its opinion there will be decided on that appeal and the record therein.

Bias and prejudice is also alleged by affiants to rest on Judge Hand's order of August 16 wherein he granted the protective order relative to the *Birdie Mae Davis* interrogatories and the contempt motion.[7]

The sequence of lawyers is of importance. The Foster suit was filed by the

5. Rule 24(b):

> Upon timely application anyone may be permitted to intervene in an action: . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

6. Rule 42(a):

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

7. One portion of the order reflects on original counsel in his effort to create a class action. The portion of the order which reflects on Mr. Blacksher is as follows:

> ". . . In a not too veiled effort to circumvent this Court's ruling thereon, [the *Foster* case] plaintiff's counsel has now, through the aegis of *Birdie Mae Davis*, attempted to propound the same set of interrogatories in an effort to elicit the same information and try to build a case on behalf of unknown others whom this Court has not been shown exist. Such subterfuge borders on the edges of contempt."

lawyer for the NEA who appeared in *Lee v. Macon County Board of Education (Conecuh County), supra*; and *National Education Assn. v. Board of School Commissioners of Mobile County, supra*. It was this lawyer who failed to follow these decisions in filing the Foster suit. After dismissal he filed the suit in intervention. He filed the interrogatories and attempted to impose a class action on the *Birdie Mae Davis* class. He was not a lawyer in the *Birdie Mae Davis* cause. He was not in the *Robinson v. Union Carbide* case. The affidavits of Foster and Buskey do not assert bias and prejudice against Judge Hand because of any problem between this lawyer and Judge Hand.

On July 2, 1974, Mr. Blacksher joined as co-counsel in filing the motion to compel answers to the interrogatories, and has taken the lead in the Foster case since that time. He is also counsel for Buskey. The NAACP Legal Defense Fund lawyers joined as counsel only in the *Birdie Mae Davis* aspects of the litigation and Mr. Blacksher is the lead counsel in that matter. It is Mr. Blacksher who is involved as counsel in the *Robinson v. Union Carbide* case but Judge Hand included the Legal Defense Fund along with Mr. Blacksher in the barratry and champerty portion of his opinion. We will thus assume that the charge of bias and prejudice is positioned on Judge Hand's references to both Mr. Blacksher and the Legal Defense Fund.

From these events, affiants concluded that Judge Hand was necessarily biased and prejudiced against them because he was biased and prejudiced against their lawyers, and through them, against those represented by them. We find no error in the refusal of Judge Hand to disqualify himself.

Section 144 requires "personal bias or prejudice" against a party.[8] No bias or prejudice personal to Foster and Buskey is set out. They seek disqualification on an imputation theory—the bias against their lawyer is imputed to them.[9] Read broadly, this peremptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will.

One answer is that "party" as used in § 144 does not include counsel as such. *Cf. United States ex rel. Wilson v. Coughlin*, 7 Cir., 1973, 472 F.2d 100, 104; *Giebe v. Pence*, 9 Cir., 1970, 431 F.2d 942, 943. On the other hand, there could be a case where the cause of the controversy with the lawyer would demonstrate bias of such a nature as to amount to a bias against a group of which the party was a member—*e. g.*, all Negroes, Jews, Germans, or Baptists. This then would be bias of a continuing and "personal" na-

8. § 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

9. No. 75-1779, *Jones v. Callaway*, pending in this court on interlocutory appeal, involves a like challenge.

ture over and above mere bias against a lawyer because of his conduct.

We find no such lawyer-to-client constructive bias in this record. The controversy is not over race but over the employment of the class action device and its ramifications in litigation. Rule 23, F.R.Civ.P. It is true that plaintiffs are Negroes and that their counsel handles civil rights cases, but the connection between the judge and the claim of bias on behalf of the particular parties here is too attenuated to require disqualification.

Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged. *See Berger v. United States*, 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *United States v. Roca-Alvarez*, 5 Cir., 1971, 451 F.2d 843, 847–48; *United States v. Townsend*, 3 Cir., 1973, 478 F.2d 1072. The affidavits were found legally insufficient here and we agree. The truth of the matters alleged was not in issue. These were in substance lawyer motions as distinguished from party motions.

Moreover, aside from the doubtful showing of personal bias by Foster and Buskey, they are foreclosed for another reason. It is settled that the requisite basis of bias and prejudice under § 144 must be extra-judicial. *See United States v. Grinnell Corp.*, 1966, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778, 793; *Berger v. United States*, 1921, 255 U.S. 22, 31, 41 S.Ct. 230, 65 L.Ed. 481, 484. The controversy with the lawyers in the present case was not extra-judicial. Rather, it was very much judicial, consisting of language in an order in the very case before the court, and in an opinion in another case before the court. Such statements are not available as grounds for a § 144 affidavit. *See United States v. Board of School Commissioners*, 7 Cir., 1974, 503 F.2d 68, 81; *Hanger v. United States*, 8 Cir., 1968, 398 F.2d 91, 101; *Mirra v. United States*, 2 Cir., 1967, 379 F.2d 782, 787–88; *Tynan v. United States*, 1967, 126 U.S.App.D.C. 206, 376 F.2d 761, 764–65; *In re Union Leader Corp.*, 1 Cir., 1961, 292 F.2d 381, 388–89.

Here again, however, we think there is an exception where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party. But, as stated, *supra*, we find an insufficient basis for such a finding in the circumstances presented here.

But § 144 is not the end of the matter. The recent amendment of 28 U.S.C.A. § 455, to require disqualification of any judge when "his impartiality might reasonably be questioned," also must be considered.[10]

The office of the procedure under § 144 is to disqualify a judge prior to trial on motion of a party. Section 455 is the statutory standard for disqualification of a judge.[11] It is self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, *Rapp v. Van Dusen*, 3 Cir.,

10. Pub.L. 93-512, § 1, 88 Stat. 1609. § 455 provides, in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, . . .

11. Compare American Bar Assn., 1972, *Code of Judicial Conduct*, Canon 3C.

1965, 350 F.2d 806, 809; through assignment of error on appeal, *United States v. Seiffert*, 5 Cir., 1974, 501 F.2d 974; *Shadid v. Oklahoma City*, 10 Cir., 1974, 494 F.2d 1267, 1268, by interlocutory appeal, as here, or by mandamus, *Texaco, Inc. v. Chandler*, 10 Cir., 1965, 354 F.2d 655.

The quoted language, *supra*, in § 455 is new to the federal law of disqualification and we must determine whether Congress intended to overrule the gloss placed on § 144, and impliedly on § 455, by court decisions that it applies only to conduct which runs against a party and not the lawyer, *cf. United States ex rel. Wilson v. Coughlin*, *supra*, at 104; *Giebe v. Pence*, *supra*, at 943; *see also*, Annot., 23 A.L.R.3d 1416; and that disqualification results from extra-judicial conduct rather than from matters arising in a judicial context. *See United States v. Grinnell Corp.*, *supra*, 384 U.S. at 583, 86 S.Ct. 1698, 16 L.Ed.2d at 793; *United States v. Board of School Commissioners*, *supra*, at 81; *Hanger v. United States*, *supra*, at 101; *Mirra v. United States*, *supra*, at 787–88; *Tynan v. United States*, *supra*, at 764–65; *In re Union Leader Corp.*, *supra*, at 388–89. *See generally*, Annot. 2 A.L.R. Fed. 917.

We find no suggestion in the legislative history that these decisions were being overruled or in anywise eroded. The new language was designed to substitute the reasonable factual basis—reasonable man test in determining disqualification for the subjective "in the opinion of the judge" test in use prior to the amendment. *Cf. Kinnear-Weed Corp. v. Humble Oil & Refining Corp.*, 5 Cir., 1971, 441 F.2d 631, 635. It was also intended to overrule the so-called duty to sit decisions. *See Edwards v. United States*, 5 Cir., 1964, 334 F.2d 360. The abuse of sound judicial discretion test continues to obtain on appellate review. H.Rep.No.93–1453, 1974 U.S.Code Cong. & Admin.News pp. 6351, 6355.

Construing §§ 144 and 455 *in pari materia* we believe that the test is the same under both. We thus hold that an appellate court, in passing on questions of disqualification of the type here presented, should determine the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party rather than counsel. The determination should also be made on the basis of conduct extra-judicial in nature as distinguished from conduct within a judicial context. This means that we give §§ 144 and 455 the same meaning legally for these purposes, whether for purposes of bias and prejudice or when the impartiality of the judge might reasonably be questioned.

Here, we have judicial activity toward lawyers without more and the result under §§ 144 and 455, considered separately and together, is that we find no error.

NO. 74–3894

This is the appeal from the order denying the motion of the *Birdie Mae Davis* plaintiffs for an order requiring the defendants to show cause why they should not be held in contempt for violating the July 9, 1971 consent decree. This is an appealable order. *Gilbert v. Johnson*, 5 Cir., 1974, 490 F.2d 827.

The motion rested for cause on the allegations contained in the Foster and Buskey claims. These claims are pending and will be processed on remand. The appertaining facts will be developed. Once developed, they may or may not be sufficient to support a show cause order in the underlying cause. In any event, the motion was decidedly premature when made. The district court did not err in refusing to reopen the *Birdie Mae Davis* case on the bare claims of Foster and Buskey, either for purposes of contempt or discovery.

The claim of the right to monitor by discovery or more appropriately, to have the court monitor, the 1971 decree was, for the same reason, premature. (We are not told if monitoring is being accomplished in the form of reporting. *See, e. g.*, the report required in *United States v. Hinds County School Board*, 5 Cir., 1970, 433 F.2d 611, 618–19.)

DISCOVERY ON REMAND

The Buskey case has not reached the discovery stage but we can assume that it is in the same posture as Foster's. In the early days of Foster's case, the district court ordered that discovery be limited to matters germane to his claim. No further effort was made to discover on his behalf.

It would have been and will now be only a slight task to modify the interrogatories which were filed so that they may be used on behalf of Foster and Buskey. They are assistant principals. They contend that they were denied promotions to requested principalships. They will be entitled to full discovery with respect to the category of position or positions sought in an effort to establish all statistical, policy and practice data of relevance to their claims. The teaching of *McDonnell Douglas Corp. v. Green*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, should be the district court's guide in allowing full discovery.

Affirmed.

APPENDIX A

AFFIDAVIT

STATE OF ALABAMA } ss
COUNTY OF MOBILE }

Edwin Foster, being first duly sworn, deposes and says as follows:

I am a plaintiff-intervenor in the above-styled cause and am filing this Affidavit pursuant to 28 U.S.C. § 144 to request that the Honorable W. Brevard Hand disqualify himself from presiding over any and all proceedings in this action on the grounds that he has a personal bias or prejudice against me and other black parents, school children and school teachers in the Mobile school system as members of the plaintiff class.

This action was commenced in 1963 through the filing of a complaint seeking the desegregation of the public schools in the City of Mobile. Until 1971, the case was presided over by the Honorable Daniel Thomas, who subsequently retired. Following a remand of this case from the Supreme Court of the United States in June of 1971, a consent decree was entered instituting a plan for the desegregation of the schools in the city of Mobile. Subsequent to the entry of that decree a variety of other matters have arisen in the case. There is presently pending before the Court a motion for summary judgment relating to the complaint in intervention filed by Edwin Foster, a motion for reconsideration of an order awarding attorney's fees and other matters regarding implementation and evaluation of the desegregation plan.

On September 26, 1974, at the request of my counsel, J. U. Blacksher, Esq., I read for the first time the opinion of Judge Hand rendered on August 29,

1974, in *Robinson v. Union Carbide Corp.*, D.C.Cir., 380 F.Supp. 731 a copy of which is attached hereto. At the same time, my counsel also called my attention to the Order entered by Judge Hand in the present case on August 16, 1974, relating to a Motion for Protective Order and a Motion to Show Cause. In that order various allegations were made concerning said counsel and concerning the wishes of members of the class and the parties to this litigation. On September 20, 1974, Judge Hand denied our motion to strike these allegations. On information and belief, and based upon a reading of the above-mentioned opinion and order, Judge Hand is biased and prejudiced against me personally because I am a person seeking redress of violations of my civil rights through an action in Federal Court. In particular, Judge Hand is biased and prejudiced against anyone or any group of persons including myself, presenting such claims through attorneys employed by and/or associated with the N.A.A.C.P. Legal Defense and Educational Fund, Inc., in that Judge Hand believes and has in fact formed the opinions through extra-judicial sources:

1. that persons who are plaintiffs in such actions do not have valid grievances but have been solicited to present unwarranted claims;

2. that claims are not presented by the above attorneys in good faith but rather for invalid and unconscionable purposes; and

3. that I and other black persons assisted by the above attorneys should be watched with suspicion as being capable of causing other black people in the community to engage in "concerted efforts," such as the manipulation of employment applications.

The result of these firmly held opinions by Judge Hand is that he cannot and will not judge my claims on the merits and according to the law but will decide them adversely regardless of the facts adduced at trial and regardless of the law. These opinions that he has formed concerning such claims and concerning the actions and motives of the attorneys presenting such claims do not allow him to have impartiality of judgment.

This Affidavit was not filed earlier because until the date set out above I had not read the decision in the *Robinson* case.

s/ Edwin Foster

Subscribed and sworn to before me on this the 26th day of September, 1974.

s/ Barbara Matthews

NOTARY PUBLIC,
MOBILE COUNTY, ALABAMA

I am one of the attorneys representing Edwin Foster in this cause. I certify that this affidavit is made in good faith.

s/ J. U. Blacksher

J. U. BLACKSHER

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

October 2, 1975

TO ALL COUNSEL OF RECORD

No. 75-1312—Birdie Mae Davis, et al; U.S.A.; Edwin Foster & James E. Buskey vs. Board of
and
No. 75-1827 School Commissioners of Mobil County, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

Order Denying Rehearing

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

by CLARE F. SACHS
Deputy Clerk

cc:
Mr. J. U. Blacksher
Mr. Charles Stephen Rolston
Messrs. J. Stanley Pottinger
Brian K. Landsberg
Ms. Judith E. Wolf
Mr. Abram L. Phillips

Order of the District Court, March 22, 1973

IN THE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 3809-N

ALFREDO G. PARRISH, ET. AL.,
Plaintiffs,

vs.

BOARD OF COMMISSIONERS OF
THE ALABAMA STATE BAR, ET AL.,
Defendants.

This cause is now submitted upon the following motions:

1. Defendants' motion to compel answers to interrogatories filed February 9, 1973.

2. Defendants' motion to require further answer to interrogatory filed February 9, 1973.

3. Plaintiffs' motion to compel further answers to interrogatories filed January 26, 1973.

4. Plaintiffs' motion for reconsideration of order of January 15, 1973, filed January 25, 1973.

5. Affidavit of disqualification filed January 19, 1973, by Plaintiff, Henry L. Thompson, said affidavit being considered by this Court as a motion to recuse.

Upon consideration of said motions and hearing held thereon March 20, 1973, it is the ORDER, JUDGMENT and DECREE of this Court as follows:

A. Defendants' motion to compel answers to interrogatories be, and the same is hereby, granted. It is further ORDERED that Plaintiff Parrish must answer said interrogatories by March 30, 1973, or he will be dismissed as a party Plaintiff.

B. Defendants' motion to require further answer to interrogatory be, and the same is hereby, granted. It is further ORDERED that Henry Thompson must answer said interrogatory No. 4 by March 30, 1973, or he will be dismissed as a party Plaintiff. Pursuant to Rule 37, Federal Rules of Civil Procedure, it is further ORDERED that Henry Thompson pay $25.00 to the Clerk of this Court for disbursement to the Alabama State Bar, said money to be used for attorney's fees.

C. Plaintiffs' motion to compel further answers to interrogatories be, and the same is hereby, denied as moot.

D. Plaintiffs' motion for reconsideration of order of January 15, 1973, be, and the same is hereby, denied.

E. Henry L. Thompson's affidavit of disqualification (motion to recuse) be, and the same is hereby, denied.

DONE this 22nd day of March, 1973.

R. E. VARNER
United States District Judge

Opinion of the Court of Appeals, December 2, 1974

ALFREDO G. PARRISH et al., etc., Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF the ALABAMA STATE BAR et al., etc., Defendants-Appellees.

ALABAMA BLACK LAWYERS ASSOCIATION et al., Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF the ALABAMA STATE BAR et al., etc., Defendants-Appellees.

Nos. 73-3553, 74-1523.

United States Court of Appeals,
Fifth Circuit.

Dec. 2, 1974.

Appeals from the United States District Court for the Middle District of Alabama.

Before TUTTLE, WISDOM and GEE, Circuit Judges.

TUTTLE, Circuit Judge:

The Alabama Black Lawyers Association (ABLA) and eight named plaintiffs appeal the grant of summary judgment against them on all issues in their class action alleging racial discrimination by the Boards of Commissioners and Bar Ex-

aminers of the Alabama Bar Association in their policies and practices governing admission to the bar.

Briefly stated, the suit sought injunctive and declaratory relief, under 42 U.S.C. §§ 1981–1983 and 28 U.S.C. §§ 2201–2202, respectively, for a class defined as "all Black persons who have applied or will apply for admission to the Alabama Bar, or who would have so applied but for having been discouraged or prevented from doing so by the [defendants'] discriminatory practices" and who meet all valid non-discriminatory standards for admission. The gist of the complaint, which was filed October 31, 1972, is that the Alabama bar examiners unconstitutionally discriminated against black applicants by identifying their supposedly anonymous examination papers and then grading them lower than white applicants who displayed equal proficiency. The complaint also alleged that the bar examination—which then [1] was exclusively written essay, "timed and closed-book"—is "unvalidated" and not sufficiently "job-related", and thus unconstitutional because it fails blacks in disproportionately high numbers compared to whites.

Shortly after the complaint was filed, each party filed several motions. Most importantly, the defendants moved to dismiss plaintiffs Eddie Jones, Thomas W. Gray and the ABLA for lack of standing, and the plaintiffs moved that the trial judge recuse himself pursuant to 28 U.S.C. § 144. The trial judge granted defendants' motion to dismiss Jones, Gray and the ABLA, but refused—after a hearing had been held and affidavits filed—to recuse himself.

Both parties undertook extensive discovery. Plaintiffs received nearly 150 pages of answers to interrogatories from defendants and took two lengthy depositions from members of the Board of Bar Examiners. Defendants received answers to interrogatories from each of the named plaintiffs. None of

1. Since July 25, 1973, Alabama has used the Multistate Bar Examination (MBE) as part of its own bar examination. The MBE is an "objective," multiple-choice type of test.

the discovery revealed specific instances where the anonymity of the examinees had been compromised; at most, the plaintiffs swore that there were one or two instances when an examiner *could have seen* an examinee's test number. The plaintiffs' case thus boiled down to a proof of statistics. Statistics produced during the litigation showed, for example, that in the last ten bar examinations the passing rate for blacks had been 32% while it had been 70% for whites. Furthermore, in a state whose population is 25% black, the number of black lawyers is less than 1%.

Defendants moved for summary judgment on April 2, 1973, but the trial court withheld a ruling for over four months in order to give plaintiffs "ample opportunity to obtain by discovery facts to be used in traversing the motion". Plaintiffs accomplished all of their desired discovery during this period, with one exception: defendants failed to produce copies of all answer sheets for the February 1973 bar examination. Defendants objected to producing these documents on the grounds that they were not relevant and material to the complaint. Plaintiffs filed a motion on May 28, 1973, to compel production.

Without specifically ruling on this motion, the trial court entered summary judgment for defendants on all issues on August 21, 1973. The court found that there was no material-issue of fact between the parties and held that "under the circumstances . . . the disparity in percentage of failures among blacks as compared to whites has little weight and fails to make out a prima facie case sufficient to realign the burden of proof so as to require the Defendants to establish that the exams are not discriminatory or so as to require them to validate the exams."

With respect to plaintiffs' other main contentions, the court held that the defendants had a compelling state interest to identify attorneys, and thus that requiring applicants to submit photographs of themselves prior to taking the examination does not "violate their constitutional rights"; however,

the court declined to consider the constitutionality of procedures (particularly a personal interview) applied to applicants petitioning to take the exam for a fourth time, following three attempts as of right, because "no Plaintiff in this lawsuit has the standing to raise the question".

Appellants' points of appeal are:

1) that the trial judge applied an erroneous legal standard in refusing to recuse himself;

2) that plaintiffs Jones, Gray and the ABLA should not have been dismissed from the suit for lack of standing;

3) that summary judgment was inappropriate, because discovery was incomplete and there were material issues of fact;

4) that the unvalidated bar examination, which fails blacks in disproportionately high numbers, is insufficiently job-related to be constitutional;

5) that the requirement of a photograph, as part of the application to take the bar examination, is unconstitutional;

6) that the procedures governing petitions to take the bar examination for a fourth time are arbitrary and capricious, and thus violate the appellants' right to due process of law.

Because we conclude that the appellants should prevail on their first ground, we discuss only that and the question relating to the parties to appeal.

I. PARTIES TO APPEAL

Before discussing appellants' contentions, it is necessary to dispose of a jurisdictional objection raised by the appellees in their brief. Appellees argue that only appellants Alfredo Parrish and Henry Thompson are properly before this Court, because the plaintiffs' notice of appeal and amended notice of appeal expressly named only Parrish and Thompson.[2] How-

2. Strictly speaking, the plaintiffs' appeal is also technically defective because it is taken from the order of the trial court and not from a judgment "set forth on a separate document" as required by the Federal Rules of Civil Procedure, Rule 58 (as amended July 1, 1963). This defect is not fatal: we assumed jurisdiction in identical circumstances in Markham v. Holt, 369 F.2d 940, 942 (5th Cir. 1966).

ever, although Parrish and Thompson are the only parties named in the text of the notices, the captions of the notices named "ALFREDO G. PARRISH, ET AL., Plaintiffs."

[1, 2] The Federal Rules of Appellate Procedure require that "The notice of appeal shall specify the party or parties taking the appeal." Rule 3(c). The objective of this provision, and of Rule 3 generally, is two-fold: to notify the Court of the taking of an appeal, and to notify the opposing party of the taking of the appeal. Cobb v. Lewis, 488 F.2d 41, 45 (5th Cir. 1974). There can be no doubt that the caption, if not necessarily the text, put defendants on notice that all of the plaintiffs intended to take appeal. Appellees have not shown that they were prejudiced or mis-led in any way by appellants' technical non-compliance with Rule 3(c).

[3] Although some other circuits may take a much more formalistic view,[3] this Court has long held that irregularities in form or procedure in filing a notice of appeal will be disregarded, when the interests of substantive justice requires it, as long as there is "substantial compliance with the rules." Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir. 1955). *See also* Crump v. Hill, 104 F.2d 36, 37–38 (5th Cir. 1939); Jones v. Chaney & James Construction Co., 399 F.2d 84, 86 (5th Cir. 1968); Cobb v. Lewis, *supra*, 488 F.2d at 44–46. As we said in *Jones*, 399 F.2d at 86:

> "The notice of appeal . . . should not be used as a 'trap for unwary draftsmen', Wright, Federal Courts, § 104 at 406 (1963); and decisions on merits should not be avoided on the basis of 'mere technicalities', Foman v. Davis, (1962) 371 U.S. 178, 181 [83 S.Ct. 227, 9 L.Ed.2d 222]."

3. Cook and Sons Equipment, Inc. v. Killen, 277 F.2d 607, 609 (9th Cir. 1960); Van Hoose v. Eidson, 450 F.2d 746, 747 (6th Cir. 1971). *Compare* Knuth v. Erie-Crawford Dairy Corp. Association, 395 F.2d 420, 427–428 (3rd Cir. 1968).

Therefore, we hold that there was adequate compliance with Rule 3(c) to put the defendants on notice that all plaintiffs intended to appeal, and that all eight named plaintiffs and the ABLA are properly before this Court. Accordingly, we proceed to the merits.

II. STANDARD FOR RECUSAL

The first point raised by appellants is that the trial judge applied an erroneous legal standard in refusing to recuse himself after an affidavit had been filed pursuant to 28 U.S.C. § 144. Section 144 provides in full:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The procedure prescribed by section 144 was not strictly followed in this case. It appears from the record that counsel for the appellants and the trial judge informally discussed the question of recusal over a month after the complaint was filed. The court later convened a hearing on December 22, 1972, to discuss the question. The judge permitted plaintiffs' counsel to question him at length at this hearing, after stating to counsel:

> "Heretofore I had felt that a judge should recuse himself very quickly because it made the court appear more fair,

> but there are other obligations the court owes and I am afraid that I shan't recuse myself but I want to give you an opportunity to put anything on record that you would like to put on record."

The section 144 affidavit was not filed until January 19, 1973. Without entering a formal order, the trial judge concluded that he should hear the case. Since it is apparent that the facts recited in the affidavit were developed to some extent from the preceding hearing, it is necessary to consider both the affidavit and the hearing in determining whether legally sufficient facts were presented to warrant recusal.

The affidavit was filed by plaintiff-appellant Thompson, who alleged two facts and reasons for his belief that the trial judge, Judge Robert E. Varner, had personal bias and prejudice in connection with the proceedings: [4]

> 4. The affidavit, which includes the requisite certificate of good faith signed by one of plaintiff-appellant's counsel, reads in pertinent part:
>
> • • • • • • • • • •
>
> "3. The facts and reasons for the belief that such personal bias and prejudice exist are as follows:
>
> a. The instant action complains, *inter alia*, that the defendants maintain a policy of excluding blacks from the practice of law in the State of Alabama. The Honorable Robert E. Varner is presently a member of the Montgomery County (Alabama) Bar Association; and when he served as President of that Association two years ago, black lawyers were excluded from membership in the said association under terms of its by-laws. The Honorable Judge Varner was then acquainted with five or six black lawyers who then practiced in Montgomery; but he never made an effort to invite them to join the Association. It was only after the aforesaid judge became interested in a federal judgeship that he, as president of the Montgomery County Bar Association, appointed a committee to revise the said by-laws; and the record is unclear as to whether the 'white only' membership clause of the Montgomery County Bar Association was removed during his tenure as president of the aforesaid association.
>
> b. None of the plaintiffs in this case are personally acquainted with the Honorable Robert E. Varner. The said judge considers the defendant commissioner Hill as a personal friend; he is a friend of Reginal Hamner, one of the chief defendants in the case; he is a friend of John Scott, defendant Hamner's prede-

1) that while Judge Varner was President of the Montgomery County Bar Association two years ago, the Association had a clause in its by-laws barring black members and that the judge never made any effort to invite black lawyers whom he knew to join;

2) that Judge Varner was acquainted with several defendants in the suit and all of defendants' counsel, and that he said he did not believe that any of the defendants whom he knew would intentionally misrepresent any of the matters related to the lawsuit.

In support of his affidavit, Thompson appended a transcript of the preceding hearing.

Both of the grounds for recusal set out in the affidavit were fully developed at the hearing. Judge Varner stated that he first became aware of the "whites only" clause in the by-laws of the Association when it was mentioned in a newspaper article speculating on the possibility of his appointment to a federal judgeship. Counsel for the appellants, Mr. Clemon, asked the judge if he then recommended removal of the clause, and the following dialogue ensued:

"THE COURT: My recollection is that I did not recommend anything but that I appointed a committee for a consideration of renovation of . . . the by-laws. . . . Frankly, when I looked at it I was appalled how out of date

cessor in office and proposed to be called by the plaintiffs as an adverse witness; he is also a friend of counsel for all of the defendants. Further the said judge is personally acquainted with many of the other defendants in this cause Although the testimony of the witnesses at the trial of this cause is expected to be conflicting in nature, the aforesaid Judge Varner has indicated that he does not believe that any of the defendants with whom he is acquainted would intentionally misrepresent any of the matters related to this lawsuit. Thus, plaintiffs sincerely believe that where the judge is called upon to make credibility choices throughout the trial, as he will be, he will attach undue weight to the testimony of his friends and acquaintances, all to the detriment of the plaintiffs and the class which they represent."

the whole thing was, not just to racial matters. . . . I believe there were several things in the . . . by-laws . . . that drew my attention and really shocked me. And I did not make any recommendation about it but I did appoint a committee to consider it, and the by-laws, as I recall it, were changed. . . .

"MR. CLEMON: After you appointed that committee did it make a report during your tenure in office?

"THE COURT: Oh, yes.

"MR. CLEMON: It did?

"THE COURT: Yes.

"MR. CLEMON: Do you recall what recommendations if any were made with respect to the racially exclusionary clause?

"THE COURT: Yes. It was removed.

"MR. CLEMON: During your tenure as president?

"THE COURT: Well, I am speaking from recollection. It may have been after my tenure; but I think it was during my tenure. I am not sure."

During other discussions at the hearing, Judge Varner stated that he personally knew ten of the thirteen defendant bar examiners. He said that of the ten, he knew three only "slightly". He added that he did not know three of the other examiners at all. He admitted that he has known defendant Reginald Hamner, who is secretary of the bar association and of the board of bar examiners,[5] "ever since he became associated with the bar association." Mr. Clemon asked what effect

5. Mr. Hamner, as secretary of the bar association and the Board of Bar Examiners, was the official in whose custody were all of the papers relating to the bar examinations. He had the application with pictures attached; he assigned the identifying numbers to the examinees; and he received the completed examinations before distributing them to the examiners for grading. He did not testify in person, but submitted an affidavit to the effect that he did not take advantage of this potential means of identifying the examinees by race.

these friendships or acquaintanceships would have on the judge's conduct of the trial:

"MR. CLEMON: Judge, do you think that in the event there was testimony—conflicting testimony involving a witness whom you didn't know and one of the defendants whom you have indicated that you do know, slightly or otherwise, that there might be any problem in your attaching more weight to the testimony of the person that you know rather than the person that you did not know?

"THE COURT: Well, it would depend on who the person I did not know, maybe, and what the evidence shows. I will say this, of the people I know here, I have no reason to think any of them would intentionally misrepresent anything. I am sure there will be some mistake in recollection, and certainly I would expect most witness to make a few mistakes in their recollection if the testimony becomes complicated.

"MR. CLEMON: Yes, sir.

"THE COURT: But I do not think I would have any prejudice or bias about that matter. Certainly—or any other matter for that matter, frankly. I have thought about the matter thoroughly, and I don't think that there is any reason why I can't fairly judge this case."

At another point, Mr. Clemon asked Judge Varner whether his friendship for over twenty years with former bar association secretary John Scott would influence the weight to which he might attach to Scott's testimony.[6] Judge Varner replied: "I don't think so. I will say this, I think Mr. Scott is an honorable man but I don't think his memory is infallible. I

6. Mr. Scott was secretary of the state bar association and the Board of Bar Examiners until approximately four years ago, when he was replaced by Mr. Hamner. In those capacities, Mr. Scott performed the same duties as outlined in footnote 5, *supra*. Mr. Scott's testimony would have been relevant to the plaintiffs' assertion that the defendants maintained a *longstanding* practice and policy of racial discrimination in procedures governing admission to the bar.

think he would try to tell you the truth in his answers. But if he appeared to evade I think I could detect it."

Thus, in summary, we have a challenge to the judge assigned to try this case alleging discrimination on account of race in the grading of bar examinations on the basis of the following factual setting: the lawyer for the plaintiffs and counsel for the defendants had held conversations off the record in the judge's chambers, apparently discussing the doubts that were in the minds of plaintiffs.[7] At this time no affidavit under section 144 had been filed. In effect, plaintiffs were undertaking to develop a basis for determining whether to file such an affidavit. The hearing conducted was in the form of questions and answers put to the judge by Mr. Clemon, counsel for the plaintiffs. This hearing developed the fact that the judge had been president of the Montgomery Bar Association shortly prior to being appointed to the bench and that at the time the rules of the Association forbade admission of black lawyers. When comment had been made in the public press about this fact and of Judge Varner's being considered for appointment to the United States Court, he appointed a commission to review the bar association by-laws, but gave no direction or suggestion that the racial restrictions be changed. They were subsequently changed, at a time which the judge thought was during his term of office, but as to this he was not certain. Judge Varner was acquainted with

7. The transcript shows the following:
"Gentlemen, you may want to have a seat at counsel table. I asked my court reporter to stay here this morning because, Mr. Clemon, (counsel for plaintiffs) I thought perhaps you would like to put *some elements of our conversation on the record in regard to your question of whether or not I should recuse myself.* I will have to say that I decided in cases earlier this week that these courts have been very reluctant about letting judges recuse themselves and I have really changed my attitude about it in the last two or three weeks. Heretofore, I had felt that a judge should recuse himself very quickly because it made the court appear more fair, but there are other obligations that the court owes *and I am afraid that I shan't recuse myself* but I want to give you an opportunity to put anything on record that you would like to put on record." (Emphasis supplied).

ten of the thirteen defendants who were members of the Board of Bar Examiners, three only slightly and several on a basis of what he considered friendship. Three of them he did not know at all. When asked as to the effect of his acquaintance or friendship with defendants in the event of a possible conflict in testimony in the anticipated hearings, Judge Varner, by the language quoted above, indicated a strong feeling of confidence in the veracity and trustworthiness of his friends. When asked expressly with respect to Mr. Scott, who had previously been secretary of the commission, and thus the one person who had custody of all of the documents, he expressed similar confidence in his likely credibility, noting that "if [Scott] appeared to evade I think I could detect it."[8]

Upon subsequently filing the affidavit, plaintiffs attached a transcript of the hearing before Judge Varner, so that we consider the section 144 affidavit to include all of the facts which are recited above. Interestingly enough, by the time the affidavit was filed in January, 1973, Judge Varner had, in effect, already decided the issue. For, as noted above he stated, before the facts were developed, "I am afraid that I shan't recuse myself but I want to give you an opportunity to put anything on record that you would like to put on record." This sounds very much as though he was intending to permit the plaintiffs to build up a record for appeal, having already decided the matter on the merits against recusing himself. This statement, having been made prior to the filing of the affidavit, must be considered as one of the "facts and reasons for the belief that bias or prejudice exists" within the language of section 144.

[4, 5] Entirely aside, however, from the apparent prejudgment of the issue just mentioned, we conclude that the other

8. It is of significance that none of these persons appeared to testify personally. The motion for summary judgment was based solely upon their affidavits. There, of course, were no opportunities to make any credibility choices by use of the normal standards available to a trial judge.

facts stated in the affidavit, and supported by the testimony of the hearing, taken as true, as they must be, for the purpose of the judge's consideration of the motion, Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) are legally sufficient to give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger, supra*, 255 U.S. at 33–34, 41 S.Ct. at 233.

[6] The applicable standards for determining the legal sufficiency of the affidavit provided under section 144 are definitively set out in the *Berger* case. The Court at 32 of 255 U.S., at 232 of 41 S.Ct., quoted from an opinion of this Court in Henry v. Speer, 201 F. 869 (5th Cir.) which said:

> "Upon the making and filing by a party of an affidavit under the provisions of section 21 [predecessor of section 144], of necessity there is imposed upon the judge the duty of examining the affidavit to determine *whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency.* If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification." (Emphasis supplied).

The Court then explains what it means by "legal sufficiency". Speaking again of the definition in Henry v. Speer, *supra*, the Court said at 33–34 of 255 U.S., at 233 of 41 S.Ct.:

> "It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury. Nor do we think that this view gives room for frivolous affidavits. Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, *and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.*" (Emphasis supplied).

The *Berger* case was decided by the Supreme Court on a certified question from the Court of Appeals for the Seventh Circuit, and was designed expressly and explicitly to answer the very question that is presented here. The language of the section[9] clearly suggests that the *belief* of the affiant if supported by the facts he or she swears to, is crucial and thus that the test of the affidavit's legal sufficiency should be whether the facts alleged could reasonably lead to the belief that the affidavit says exists in the minds of the plaintiffs. *Berger* supports this approach. *See* Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv.L.Rev. 1435, 1446–47 (1966).[10] It is true that some post-*Berger* cases have adopted a different test, one that would virtually require that the facts—taken, of course, as true—are sufficient to demonstrate a personal bias or prejudice *in fact* on the part of the trial judge for or against one of the parties.[11]

The only case in this Circuit that discusses the matter is Simmons v. United States, 89 F.2d 591 (10 Cir., 1937), upon which the appellees here rely. In *Simmons,* the affiant alleged that the trial judge had represented a potential witness and the relative of a potential witness, and that the trial judge was "friendly [sic] inclined" toward them. The Court held: "However, it is settled that an affidavit of disqualification under the section must state facts showing the personal prejudice of the judge against the defendant and not baseless conclusions." 89 F.2d at 592. This formulation of the rule is correct, as far as it goes. However, it fails to distinguish

9. I. e., "The affidavit shall state the facts and the reasons *for the belief* that bias or prejudice exists . . . (Emphasis added)."

10. "A formulation . . . in keeping with the purpose of the statute would require only that the facts alleged must justify a reasonable apprehension on the part of the affiant that the judge may be biased [Footnote omitted]. This formulation shifts the emphasis from the judge's actual state of mind to the reasonableness of the litigant's fear, an emphasis at least supported, and possibly required, by the statutory language . . ."

11. *See* Note, Disqualification of a Federal District Judge for Bias—the Standard under Section 144, 57 Minn.L.Rev. 749, 758 (1973).

between *testing* the facts to see if they 1) support the reasonableness of the affiant's belief, or 2) reasonably support a determination that bias or prejudice *in fact* exists. Because the language in *Simmons* does not rule out the possibility of the first interpretation, we therefore think there is no precedent in this Circuit which holds that the affidavit *must* be measured for sufficiency by a standard of actual, rather than the existence of a reasonable belief in, bias or prejudice on the part of the trial judge. Thus, *Simmons* fails to provide the necessary guidance for determining completely the issue before us.

More instructive, it seems to us, as to the attitude that should be taken with respect to the treatment of a claim of bias or prejudice is the decision and language of this Court in United States v. Columbia Broadcasting System, Inc., 497 F.2d 107 (5th Cir. 1974). Although that case dealt with the trial by a judge who had ordered contempt charges filed against the respondent, the guarantee to a party of a fair and impartial tribunal, as stated in that case are no different than they are here. The court said at 109:

> "The recondite niceties of contempt law coupled with the strange milieu of a judge passing on the clarity of his own orders, which had to be substantiated largely by his own legal staff, should make us particularly sensitive *to the demands of justice, and more particularly, to the appearance of justice.* The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." (Emphasis supplied).

We conclude that a trial court cannot be free from "any hint or appearance of bias" unless a party's sworn *belief* of the existence of bias, supported by substantial facts, is of primary concern. Thus, we reject as invalid the so-called objective test.[12]

12. *See* footnote 11, *supra.*

[7] In summary, it was not the function of the trial court to weigh the facts, largely developed by his own testimony when relating his relationships with the Montgomery Bar Association and with some ten of the defendants. Under the standards long ago set down in this Circuit, and adopted by the Supreme Court in *Berger,* his only function under section 144 was to determine whether the facts asserted gave "fair support to the *charge* of a bent of mind that may prevent or impede impartiality of judgment." [Emphasis supplied.] As stated in Henry v. Speer, *supra,* and reiterated by the Supreme Court in *Berger, supra,* "He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification." 255 U.S. at 32, 41 S.Ct. at 232.

The judge's preliminary statement that he "was afraid that I shan't recuse myself" and his repetition twice subsequently, when commenting on the problem arising from his friendship with some of the defendants, of his opinion that he was neither biased nor prejudiced and that there was nothing to prevent him from trying the case fairly, all as set out above, make it clear beyond a doubt that the court believed it was his duty to decide the issue as to whether or not he was actually biased, rather than to restrict his consideration to the question whether there was a reasonable basis alleged for the belief of the plaintiffs or even that there was a reasonable basis for the *charge* that he was in fact prejudiced for or against one of the parties.

While we deeply regret the necessity of further proceedings in a case which has been argued fully on the merits in this Court, we are required to give proper attention to the appellants' initial contention that the trial court used an improper standard in determining whether he should recuse himself. Having concluded that a mistaken standard was used, in that the trial judge did not address himself at all to the question of the sufficiency of the allegations, we conclude that the judgment must be reversed. Moreover, we are satisfied that the affidavit and the supporting facts, as here outlined, do meet

the standard of section 144 and that under the circumstances the trial judge had no course of action but to follow the procedure set out in the statute, which says that under such circumstances "such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Opinion of the Court of Appeals, December 4, 1975

ALFREDO G. PARRISH et al., etc., Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF the ALABAMA STATE BAR et al., etc., Defendants-Appellees.

ALABAMA BLACK LAWYERS ASSOCIATION et al., Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF the ALABAMA STATE BAR et al., etc., Defendants-Appellees.

Nos. 73-3553, 74-1523.

United States Court of Appeals,
Fifth Circuit.

Dec. 4, 1975.

Appeals from the United States District Court for the Middle District of Alabama.

Before BROWN, Chief Judge, and TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON,* MORGAN, CLARK, RONEY and GEE, Circuit Judges.

---

* Judge Simpson did not participate in this matter.

BELL, Circuit Judge:

This appeal involves one assignment of error directed to the denial of a motion, filed pursuant to 28 U.S.C.A. § 144, to disqualify the district judge who decided the matter. There are other assignments of error arising from the merits of the suit which claimed discrimination in the administration of the Alabama bar examination.[1] We consider en banc only the assignment of error having to do

---

[1] There is no merit whatever in the jurisdictional objection of appellees.

with disqualification.[2] As will be seen, we find no error in the denial of the motion to disqualify, and thus the cause will be remanded to the original hearing panel for disposition of the other questions presented.

I.

The threshold requirement under the § 144 disqualification procedure is that a party file an affidavit demonstrating personal bias or prejudice on the part of the district judge against that party or in favor of an adverse party.[3] Once the affidavit is filed, further activity of the judge against whom it is filed is circumscribed except as allowed by the statute. In terms of the statute, there are three issues to be determined: (1) was the affidavit timely filed; (2) was it accompanied by the necessary certificate of counsel of record; and (3) is the affidavit sufficient in statutory terms? *See generally* 13 Wright, Miller & Cooper, Federal Practice and Procedure §§ 3541–53 (1975).

We are concerned only with the third issue. As we said in *Davis v. Board of School Commissioners of Mobile County*, 5 Cir., 1975, 517 F.2d 1044:

"Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged. *See Berger v. United States*, 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *United States v. Roca-Alvarez*, 5 Cir., 1971, 451 F.2d 843, 847–48; *United States v. Townsend*, 3 Cir., 1973, 478 F.2d 1072."

517 F.2d at 1051.

Legal sufficiency is determined as a question of law on the basis whether the affidavit sets out facts and reasons for the party's belief that the judge has a personal bias and prejudice against the party or in favor of the adverse party. The facts and reasons set out in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States, supra*, 255 U.S. at 33, 41 S.Ct. at 233, 65 L.Ed. at 485.

The legal question presented is determined by applying the reasonable man standard to the facts and reasons stated in the affidavit. *See United States v. Thompson*, 3 Cir., 1973, 483 F.2d 527, which states the standard as requiring that the facts be such, their truth being assumed, as would "convince a reasonable man that a bias exists", 483 F.2d at 528.[4] The tripartite test of the Third Circuit is as follows:

"In an affidavit of bias, the affiant has the burden of making a three-fold showing:

"1. The facts must be material and stated with particularity;

"2. The facts must be such that, if true they would convince a reasonable man that a bias exists.

"3. The facts must show the bias is personal, as opposed to judicial, in nature."

483 F.2d at 528.

The pertinent part of the affidavit filed against Judge Varner is set out in the margin.[5] We consider it in light of the transcript developed in an examination of the district judge some weeks before the affidavit was filed.[6] See the discussion of the content of the tran-

2. The panel opinion dated December 2, 1974 is reported. *Parrish v. Board of Commissioners of the Alabama State Bar*, 5 Cir., 1975, 505 F.2d 12. The opinion was withdrawn on February 20, 1975. *Parrish v. Board of Commissioners of the Alabama State Bar*, 5 Cir., 1975, 509 F.2d 540. The court determined on June 5, 1975, *sua sponte*, to consider the matter en banc.

3. § 144.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

4. The reasonable man standard was first articulated in terms of requiring that the affidavit state facts "from which a sane and reasonable mind may fairly infer bias or prejudice." *Keown v. Hughes*, 1 Cir., 1920, 265 F. 572, 577. *Accord, Craven v. United States*, 1 Cir., 1927, 22 F.2d 605, 607; *Wilkes v. United States*, 9 Cir., 1935, 80 F.2d 285, 289; *Hurd v. Letts*, 1945, 80 U.S.App.D.C. 233, 152 F.2d 121, 122; *Eisler v. United States*, 1948, 83 U.S.App. D.C. 315, 170 F.2d 273, 278.

5. 2. Plaintiff believes and avers that the judge before whom this action is pending, the Honorable Robert E. Varner, has a personal bias and prejudice against him, the other named plaintiffs, and the class represented by plaintiffs in this action.

3. The facts and reasons for the belief that such personal bias and prejudice exist are as follows:

a. The instant action complains, *inter alia*, that the defendants maintain a policy of excluding blacks from the practice of law in the State of Alabama. The Honorable Robert E. Varner is presently a member of the Montgomery County (Alabama) Bar Association; and when he served as President of that association two years ago, black lawyers were excluded from membership in the said association under the terms of its by-laws. The Honorable Judge Varner was then acquainted with the five or six black lawyers who then practiced in Montgomery; but never made an effort to invite them to join the association. It was only after the aforesaid judge became interested in a federal judgeship that he, as president of the Montgomery County Bar Association, appointed a committee to revise the said by-laws; and the record is unclear as to whether the "white only" membership clause of the Montgomery County Bar Association was removed during his tenure as president of the aforesaid association.

b. None of the plaintiffs in this case are personally acquainted with the Honorable Robert E. Varner. The said judge considers the defendant Commissioner Hill as a personal friend; he is a friend of Reginald Hamner, one of the chief defendants in the case; he is a friend of John Scott, defendant Hamner's predecessor in office and proposed to be called by the plaintiffs as an adverse witness; he is also a friend of counsel for all of the defendants. Further the said judge is personally acquainted with many of the other defendants in this cause. Although the testimony of the witnesses at the trial of this cause is expecte be conflicting in nature, the aforesaid Judge Varner has indicated that he does not believe that any of the defendants with whom he is acquainted would intentionally misrepresent any of the matters related to this lawsuit. Thus, plaintiffs sincerely believe that where the judge is called upon to make credibility choices throughout the trial, as he will be, he will attach undue weight to the testimony of his friends and acquaintances, all to the detriment of the plaintiffs and the class they represent.

6. The unorthodox procedure of an examination of the judge by counsel for plaintiff prior to filing the affidavit leads to some confusion on review. For example, plaintiffs take some comfort from Judge Varner's statement during the examination that he would not disqualify. This appears to them as a prejudgment. In any event, such prejudgment as existed was academic absent the required affidavit. The affidavit was filed 30 days later.

script in the panel opinion, 5 Cir., 505 F.2d 12.

The factual bases in the affidavit of disqualification are also summarized in the panel opinion as follows:

> "(1) that while Judge Varner was President of the Montgomery County Bar Association two years ago, the Association had a clause in its by-laws barring black members and that the judge never made any effort to invite black lawyers whom he knew to join;
>
> "(2) that Judge Varner was acquainted with several defendants in the suit and all of defendants' counsel, and that he said he did not believe that any of the defendants whom he knew would intentionally misrepresent any of the matters related to the lawsuit."
>
> 505 F.2d at 17.

II.

With these facts and the recited legal principles in mind, we proceed to a consideration of the sufficiency of the affidavit. Personal bias or prejudice is required under § 144. Neither of the factual bases alleged for recusal here raises an inference of personal bias or prejudice.

The first ground asserted, Judge Varner's past activities in the Montgomery Bar Association, is essentially an allegation based on the judge's background and states no specific facts that would suggest he would be anything but impartial in deciding the case before him. The claim of bias is general or impersonal at best. *See Eisler v. United States*, 1948, 83 U.S.App.D.C. 315, 170 F.2d 273; *Simmons v. United States*, 5 Cir., 1937, 89 F.2d 591; *Price v. Johnston*, 9 Cir., 1942, 125 F.2d 806; *cf. United States v. Seiffert*, 5 Cir., 1974, 501 F.2d 974, 977–78.

The second ground, regarding Judge Varner's acquaintance with some of the defendants and counsel, has been rejected as a basis for requiring the disqualification of a trial judge. *See e. g. Simmons v. United States*, 5 Cir., *supra; Parker Precision Products Co., Inc. v. Metropolitan Life Insurance Co.*, 3 Cir., 1969, 407 F.2d 1070, 1077; *Broome v. Simon*, W.D.La., 1965, 255 F.Supp. 434, 438. The argument is that Judge Varner would be biased when it came to making credibility choices among witnesses. His statements made when being examined by counsel as to his possible disqualification were no more than an acknowledgement of friendship or acquaintanceship, and a refusal to condemn these persons as unworthy of belief in advance of whatever their testimony might prove to be. A statement by Judge Varner that he would believe, without question, any testimony of such persons would require a different result. Here, however, Judge Varner's answers did not reflect a lack of impartiality. The additional ground of the friendship between the judge and counsel for appellees, without more, is so lacking in merit as to warrant no discussion.

In short, the affidavit, including the facts on which it was based, was legally insufficient under § 144 to require disqualification. Judge Varner did not err in so ruling.

III.

We next consider questions which arise in an unusual context. Title 28, § 455, was amended effective December 5, 1974. The order of the district court being appealed from was entered and the panel opinion of this court was issued prior to December 5, 1974. Appellants suggest, nevertheless, that because the court determined to hear the cause en banc, and to receive supplemental briefs, the cause was thereby not "fully submitted" for appellate review prior to the effective date of the amendment.[7]

We held in *Davis v. Board of School Commissioners of Mobile County, supra*, that the amended statute applied where that appeal had not been fully submitted on the effective date of the Act. Here the appeal was submitted on June 11, 1974 when the original panel heard oral argument and took the cause under submission. Indeed, the panel opinion was issued on December 2, 1974, three days before the effective date of the Act. That opinion was withdrawn, however, and thus the matter continued under submission. Thereafter, on June 5, 1975, the court ordered the matter heard en banc and allowed supplemental briefs.

Assuming that an appeal is fully submitted after the briefing schedule has terminated and oral argument, if there is to be such, has taken place, then it may well be asserted that this cause was, in effect, reopened when the supplemental briefs were allowed on en banc consideration. Given this circumstance and the policy of the statute, we conclude that the question of disqualification must also be reviewed.[8] Under the standards now embraced in amended § 455. The questions to be considered go to the sufficiency of the affidavit, as bolstered, in the peculiar posture of this case, by the transcript of the pre-affidavit interview or examination of Judge Varner. They are questions of law and may be decided in this court although never presented to the district court. *Davis v. Board of School Commissioners, supra.*

There are now several standards in § 455.[9] Some go to specific conduct, but

7. The Act amending § 455 provides:

> This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act. Pub.L. 93–512, § 3, 88 Stat. 1609.

8. One caveat is important in the administration of §§ 144 and 455. Ordinarily the provisions of § 455 would be drawn into issue in determining the sufficiency of an affidavit under § 144 only to the extent that affiant relies upon those provisions in filing the affidavit. Here we consider the provisions of amended § 455 only because the amendment is made applicable to cases not fully submitted on appeal and because the amendment was not in being when the affidavit was made.

   We described the relationship between § 144 and § 455 in *Davis* as follows:

> "The office of the procedure under § 144 is to disqualify a judge prior to trial on motion of a party. Section 455 is the statutory standard for disqualification of a judge. It is self-enforcing on the part of the judge. It may also be asserted by a party by motion in the trial court, *Rapp v. Van Dusen*, 3 Cir., 1965, 350 F.2d 806, 809; through assignment of error on appeal *United States v. Seiffert*, 5 Cir., 1974, 501 F.2d 974; *Shadid v. Oklahoma City*, 10 Cir., 1974, 494 F.2d 1267, 1268, by interlocutory appeal, as here, or by mandamus, *Texaco, Inc. v. Chandler*, 10 Cir., 1965, 354 F.2d 655."
>
> 517 F.2d at 1051–52.

9. 28 U.S.C.A. § 455, reads in pertinent part:

> (a) Any justice, judge magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> * * * * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial in-

one, set out in § 455(a), is general and does not rest on the personal bias and prejudice stricture of §§ 144 and 455(b)(1). As we noted in *Davis, supra,* 517 F.2d at 1052, the language of § 455(a) was intended to displace the subjective "in the opinion of the judge" test for recusal under the old statute, and the so-called "duty to sit decisions". We also noted that § 455(a) was intended to substitute a "reasonable factual basis—reasonable man test" in determining whether the judge should disqualify himself. *See* 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3542 (1975). *See also,* Frank, *Commentary on Disqualification of Judges-Canon 3c,* 1972, Utah L.Rev. 377, 379. Note, *Disqualification of Judges and Justices in the Federal Courts,* 86 Harv.L.Rev. 736, 745–50 (1973).

[6] Considering first the § 455(a) claim, and the relevant facts and circumstances, we are of the view that a reasonable man would not infer that Judge Varner's "impartiality might reasonably be questioned". The facts have been stated in our discussion of the § 144 issue.

Judge Varner was president of a local bar association in which black lawyers were denied membership. This policy was changed during or shortly after his administration as president. As the affidavit makes clear, see Note 5, *supra,* he, at the least, set the change in policy in motion by appointing a committee to revise the by-laws. He is faulted for not making an effort to obtain membership for black lawyers through inviting them to join, yet he, in effect, did just this in having the by-law changed. Appellants' logic would catch saint and sinner alike. There is hardly any judge in this circuit who was not a member of a segregated bar association at one time, and many have held a high office in the bar associations. The way of life which included segregated bar associations has been eliminated but only a new generation of judges will be free from such a charge. In any event, this circumstance will not support a claim of lack of impartiality. Such a claim must be supported by facts which would raise a reasonable inference of a lack of impartiality on the part of a judge in the context of the issues presented in a particular law suit. There are no such facts here. The stated conduct of Judge Varner does not support such an inference.

The allegation of lack of impartiality stemming from Judge Varner's acquaintanceship or friendship with witnesses and defense counsel is likewise tenuous. It does not exceed what might be expected as background or associational activities with respect to the usual district judge. As a factual basis, the allegations fall short of supporting an inference of lack of impartiality under § 455(a).

The factual basis also falls short under § 455(b)(1), in that there is no particularized allegation that Judge Varner had "personal knowledge of disputed

terest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * * * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

* * * * * *

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, . . .

* * * * * *

evidentiary facts concerning the proceeding". Credibility choices are not disputed facts.

There are two additional claims of disqualification under amended § 455. They are based on the membership of Judge Varner in the Alabama State Bar, an organization in which membership has long been compulsory under the integrated bar concept. Title 46, §§ 30, 42, Code of Alabama. Each claim is attenuated in the extreme.

First, it is suggested that Judge Varner has a substantial interest in the success of defendants in the suit because of his identification with the bar association. Appellants rely on § 455(b)(4) for this proposition. No interest exceeding mere membership is asserted. This is not a ground for disqualification.

The second ground based on the judge's bar association membership is that he has a financial interest in the outcome of this case because the bar association may be compelled to pay attorneys' fees should plaintiffs succeed. Although the amended § 455 states that any "financial interest" in the subject matter in controversy or any party to the proceeding requires recusal, the spectre of the potential obligation of the Board of Commissioners, a judicial organ of the state, Title 46, § 21 et seq., Code of Alabama, for attorneys' fees does not fall within the statutory definition of "financial interest". Section 455(d)(4), n. 9, *supra.*

We affirm as to the denial of the motion to disqualify. Except as to that issue, the appeal is remanded to the original panel for disposition.

JOHN R. BROWN, Chief Judge (specially concurring):

I concur in the result and all of Judge Bell's opinion in Parts II and III and all of the opinion in Part I except that portion which specifically adopts the test in the Third Circuit case of *United States v. Thompson,* 3 Cir., 1973, 483 F.2d 527. I believe that the portion of the test in *Thompson* that requires a finding that "the facts . . . if true . . . would convince a reasonable man that a *bias exists*" (emphasis added) can be read as requiring proof of bias in fact. I do not think that we need go this far. Under the other acceptable and frequently used test, whether a reasonable person could reasonably have a *belief* of bias, this affidavit is still insufficient. Therefore, I would reach the same result, but I think that we need not decide at this point which of these two possibly divergent standards we should apply.

GODBOLD, Circuit Judge (specially concurring):

I concur in the result and in Part II of Judge Bell's opinion. I agree with Judge Roney that we do not reach 28 U.S.C. § 455 standards.

RONEY, Circuit Judge (specially concurring):

I concur in the result and Part II of Judge Bell's opinion. As to Part I, I join in Chief Judge Brown's concurrence. Part III considers a question which I do not believe is before the Court, *i. e.,* whether the district judge's refusal to recuse himself was proper under 28 U.S.C.A. § 455 standards, as amended on December 5, 1974.

I agree that *en banc* consideration makes this an appellate review not "fully submitted," so that § 455, as amended, would apply *to* this appellate review, which means it would set the standard for recusal of any of our reviewing

judges who might be challenged for bias. But that is not the question. The district judge sat at trial. What act applied *to* the trial? Congress clearly provided that the new § 455 Act "shall not apply to the trial of any proceeding" commenced prior to December 5, 1974. The trial of this proceeding was completed prior to that date. We are judging the correctness of that trial and should do so by the standard applying to it as clearly set forth in the statute.

The Act amending § 455 provides:

> This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act. Pub.L. 93–512, § 3, 88 Stat. 1609.

The application of this act to the district judge's refusal to recuse himself at trial of this proceeding envisions a provision as to when the amendment is to be applied *in* "appellate review," not *to* appellate review. Congressional approach, however, was to address the level "of any proceeding" that the statute would apply *to*. Part III of Judge Bell's opinion applies § 455 *in* appellate review *to* a trial of this proceeding to which the act specifically says it does not apply. It seems inconsistent to provide one standard of recusal for the trial judge to apply to himself at the trial, and provide a different standard by which to review the correctness of his failure to recuse. Apparently Congress thought so too. I would not apply the act contrary to the express directions of Congress.

GEE, Circuit Judge (specially concurring):

The proper interpretation of Section 144 is a vexed matter with which I have long struggled. The belief of the parties that they are receiving even-handed justice, the apparency of justice to those not parties, the importance of both perceptions in maintaining the legitimacy of the judicial institution, the difficult decisions faced by a judge called upon to stand recused, and the practical implications of § 144 for the continued efficient functioning of the district courts in our circuit are some of the competing considerations. They are not easily harmonized, and, indeed, there may be no entirely satisfactory manner of implementing Section 144. And though I concur fully in the opinion of the court on the assumption that *United States v. Berger*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed.2d 481 (1921), remains good law, I feel obliged to express my doubt that it does or should. For, in my respectful view, *Berger* represents an outdated rule which has been made tolerable in present circumstances only by engraftment of dubious exceptions.

The majority opinion reaffirms *Berger's* antique rule that whatever "facts" the recusal affidavit may assert cannot be questioned but must be accepted as gospel.[1] Such an approach gives free play to the unscrupulous or reckless affiant, willing to run his chance of a ponderous and unlikely prosecution for perjury—and perhaps in little danger, since *Berger* seems to say that "affidavit" assertions made on mere information and belief will suffice for § 144 purposes.[2] Perjury charges have traditionally been based on falsely stated physical facts, and are rarely extended to representation of opinions. Suffice to say, establishing beyond reasonable doubt bad faith in assertion of a belief purportedly held at the time of an affidavit's filing is no light task.[3] For similar reasons, counsel will not likely fear disciplinary proceedings initiated by the local bar. I am reluctant to join in mandating a procedure which envisions, for example, that a judge must take as true an affidavit asserting, perhaps on "information and belief," that he has recently engaged in an acrimonious personal dispute with a defendant—complete with particulars—and is therefore disqualified to sit in his case, when the judge well knows that the affidavit has misidentified him and is mistaken. We go far enough when we read § 144 as withdrawing from the judge decision of the final fact, his own actual bias. We should not require him to conduct such a curious and hypothetical proceeding as deciding whether an apprehension or bias is reasonably supported by whatever supposititious state of facts a daring and unscrupulous, or perhaps merely misadvised and agitated, party may be willing to swear to.

Factual matters necessary to decision of preliminary questions, of which recusal is a prickly example, are routinely resolved by weighing and evaluating affidavits. *See, e. g.*, Wright & Miller, Federal Practice and Procedure § 1373, at 714. Only three workable modes of deciding this particular question occur: (1) peremptory disqualification upon the mere filing of an affidavit; (2) decision of the issue by another magistrate than the one accused; or (3) decision either of actual bias or the reasonable appearance of it by the magistrate sought to be disqualified.

There are indications in the legislative history that peremptory disqualification was the legislative intent;[4] but this construction has never been adopted by any court. Reference to another magistrate is utterly foreign to the statutory scheme and raises its own problems of administrative inconvenience and delay. The statute's language gives fair support to the construction that the judge is not to determine bias-in-fact, and common sense supports the view that few if any humans can fairly decide whether they themselves are or are not biased in any given matter. But it is not too much to ask that a conscientious magistrate determine whether a given affidavit contains enough truth to fairly support a reasonable apprehension that he may be biased, or that an appellate court review that decision effectively. There is, therefore, no need to discern in § 144 a rule by which a party who really wants to do so and has the nerve can at pleasure disqualify any federal judge in a given proceeding by presenting to him a spurious set of ex parte "facts" which he cannot question—and by which his opponent can disqualify his first replacement by the same means.[5]

I freely admit that *Berger* appears on its face to foreclose my reading of § 144.

1. And though it also reaffirms the settled rule that judicial actions cannot be made the basis of an accusation of bias, it should not be difficult for an inventive affiant to assert extra-judicial bases that disguise an aversion actually grounded in judicial philosophy and approach.

2. 255 U.S. at 34, 41 S.Ct. 230.

3. The author of Note, 79 Harv.L.Rev. 1435 (1966), found no cases in which a perjury charge stemming from a § 144 affidavit had ever been prosecuted during the (then) forty-five years since *Berger*. *Id.* at 1442. Indeed, I have found none to date.

4. The chief sponsor of the bill, asked if the judge retained any discretion after the filing of the recusal affidavit, replied: "No, it provides the judge shall proceed no further with the case." 46 Cong.Rec. 2627 (1911).

5. Section 144 limits a *party* to " . . . one such affidavit in any case."

The *Berger* decision, however, has not gone unscathed—even by its authors—in the many years since 1921. It is notorious that, faced with its quixotism, courts on the firing line have, addressing other issues, limited its scope in ways perhaps dubious. As is duly observed, for example, in Comment, 57 Minn.L.Rev. 749, 755 (1973), the lower federal courts have effectively rejected a liberal reading of *Berger* by such anomalous and desperate devices as requiring that the affidavit establish *bias-in-fact*, *United States v. Gilboy*, 162 F.Supp. 384, 393 (M.D.Pa. 1958), by restricting the *types* of facts which may constitute a sufficient affidavit, *Chessman v. Teets*, 239 F.2d 205, 215 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957), and by requiring that the bias be directed to the party *personally*, *Cole v. Lowe's Inc.*, 76 F.Supp. 872, 876 (S.C.Cal.1948), *rev'd on other grounds*, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954, 71 S.Ct. 570, 95 L.Ed. 688 (1951). The Supreme Court has directly approved one such inroad in *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), holding that the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." Although the *Grinnell* Court cited *Berger*, the proposition stated can be construed far more broadly than anything mentioned there. Also, *Berger* to the contrary notwithstanding, it is far from clear that the Supreme Court in *Grinnell* felt itself bound to accept as given fact the allegations made by the affiants: in its opinion the Court quotes from what can only be the transcript of pretrial proceedings, a type of matter which the *Berger* Court went out of its way to declare irrelevant. In other instances the Court has denied certiorari and left standing inroads on and narrow interpretations of *Berger*. *See, e. g., Pfizer, Inc. v. Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976, 92 S.Ct. 2411, 32 L.Ed.2d 676 (1972);[6] *Mirra v. United States*, 379 F.2d 782, 787–88 (2d Cir.), *cert. denied*, 389 U.S. 1022, 88 S.Ct. 593, 19 L.Ed.2d 667 (1967); *Ryan v. United States*, 99 F.2d 864, 871 (8th Cir. 1938), *cert. denied*, 306 U.S. 635, 59 S.Ct. 484, 83 L.Ed. 1037 (1939). I am all but convinced that if faced with the facts of *Berger* today the Supreme Court would decide it otherwise. Being so persuaded, I would not lightly expose our circuit to such risks of wholesale disruption as an untimely resurrection of Berger in its pristine and literal form threatens, to be endured until the Supreme Court—grappling with the mighty concerns which face it—is able to reconsider these questions.

Finally, I realize that the approach to § 144 I advance is likely foreclosed even by previous panel decisions in our own circuit. *Davis v. Board of School Comm'rs*, 517 F.2d 1044 (5th Cir. 1975); *United States v. Roca-Alvarez*, 451 F.2d 843, 847–48 (5th Cir. 1971), *rehearing granted*, 474 F.2d 1274 (5th Cir. 1973); *Beland v. United States*, 117 F.2d 958, 960 (5th Cir.), *cert. denied*, 313 U.S. 585, 61 S.Ct. 1110, 85 L.Ed. 1541 (1941); *Simmons v. United States*, 89 F.2d 591, 592–93 (5th Cir.), *cert. denied*, 302 U.S. 700, 58 S.Ct. 19, 82 L.Ed. 540 (1937), and indeed *Henry v. Speer*, 201 F. 869 (5th Cir. 1913), quoted with approval in *Berger*. But I do not think such a position wise or practical, and the court en banc is free to adopt a different one. I would grasp the nettle now.

6. In *Pfizer* the court was interested in a demonstration of actual personal bias. In order to decide the issue the court "carefully examined the petition, the underlying joint affidavit, the responses thereto, *and portions of the record pertinent to petitioners' claims*." 456 F.2d at 533 (emphasis added). And, although accepting as true the facts recited in the affidavit, "[w]e determine the validity of petitioners' conclusion of bias *by examining the cited facts against the record presented to us*." 456 F.2d at 537 (emphasis added).

TUTTLE, Circuit Judge, with whom GOLDBERG, Circuit Judge, joins, dissenting.

With deference I disagree with the opinion of the Court as to the standard that is to be used by the Court in determining whether an affidavit for bias filed under § 144 is "sufficient." I agree with the statement quoted in the opinion from *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5th Cir. 1975):

> "Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged. *See Berger v. United States*, 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481; *United States v. Roca-Alvarez*, 5 Cir., 1971, 451 F.2d 843, 847–48; *United States v. Townsend*, 3 Cir., 1973, 478 F.2d 1072."

I cannot agree, however, that the standard of determining the "legal sufficiency of the affidavit" is one that requires that the facts be such, their truth being assumed, as would "convince a reasonable man that a bias exists." As stated in the panel opinion of the Court, subsequently withdrawn, 5 Cir., 505 F.2d 12, I am of the view that the standard is one that merely requires that the facts be such, their truth being assumed, as would convince a reasonable man that the affiant reasonably *believed* that bias exists.

Of course, this Court, sitting *en banc*, is writing on a clean slate, and in doing so the Court, very properly, I think, considers that the standard to be applied to the decision of this issue is one that must meet the requirements of § 455. It is my opinion that the *Berger* case, construing the predecessor of § 144 and the new amended § 455, outlined and discussed in the majority opinion, both require that the judge against whom an affidavit for bias is lodged must determine only whether the allegations are such as would cause a reasonable person standing in the same relationship as does the affiant to *believe* that the challenged judge has a "bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33, 41 S.Ct. 230, 233, 65 L.Ed. 481.

If what is called the "objective" standard, that is whether a reasonable man would conclude that bias actually exists had been the standard intended by the Supreme Court in *Berger* the Court would not have said that the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." It would have said rather that the affidavit "must give fair support to the existence or fact of a bent of mind, etc." In discussing the standard in *Berger*, the Court referred to the language that the "affidavit shall state the facts and the reasons for the belief" of the existence of the bias or prejudice. The Court said:

> "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the *charge* of a bent of mind . . . ." [Emphasis added.]

It seems clear to me that this statement means that the affidavit must reason-

ably support the *belief* of the affiant and not that it must reasonably support the actual existence of bias. This view has been expressed in the following language:

> "A formulation . . . in keeping with the purpose of the statute would require only that the facts alleged must justify a reasonable apprehension on the part of the affiant that the judge may be biased [footnote omitted]. This formulation shifts the emphasis from the judge's *actual state of mind* to the reasonableness of the *litigant's fear*, an emphasis at least supported, and possibly required, by the statutory language . . . " [Emphasis added.]

Disqualification of Judges for Bias in the Federal Courts, 79 Harv.L.Rev. 1435, 1446–47 (1966).

The approach which I would take to the construction of this statute seems to me much more consistent with the expression of this Court in *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107 (5th Cir. 1974) dealing with the basic right of a party to a fair and impartial tribunal:

> "The recondite niceties of contempt law coupled with the strange milieu of a judge passing on the clarity of his own orders, which had to be substantiated largely by his own legal staff, should make us particularly sensitive *to the demands of justice, and more particularly, to the appearance of justice*. The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from *any hint or appearance* of bias is the palladium of our judicial system." [Emphasis supplied.]

I would conclude that a trial court cannot be free from "any hint or appearance of bias" unless a party's sworn *belief* of the existence of bias, supported by substantial facts, and tested by a standard of reasonableness, is of primary concern.

The view which I hold as to the proper interpretation of § 144 is fortified by the recent enactment by Congress of amendments to § 455. This section of the Code provides as follows:

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The House Report on this bill which adopted major portions of the Senate Report, No. 93–419 to accompany the Senate Bill commented expressly on the relation between this amendment and the newly adopted Code of Judicial Conduct for United States Judges.[1] The Report contains the following language:

> "Thus, the present situation is one where the Judicial Conference has made applicable to all federal judges the new Code of Judicial Conduct, including Canon 3C relating to disqualification of judges. The present language of § 455 of title 28 is less restrictive than the new Canon on disqualification. The bill (S. 1064) under consideration would amend section 455 by making it conform, with two exceptions, to the requirements of the canon on disqualification."

1974 U.S. Code Congressional & Administrative News, p. 6353.

1. This Code of Judicial Conduct for United States Judges was adopted by the Judicial Conference of the United States in April, 1973.

Only one of the "exceptions" referred to in the foregoing language is relevant to our discussion. This exception is the change made in the third word of the Code of Judicial Conduct. Congress saw fit to change the words "a judge *should* disqualify himself in a proceeding in which his impartiality might reasonably be questioned" to "a judge *shall* disqualify himself in a proceeding in which his impartiality might reasonably be questioned," thus indicating more clearly the intent of Congress that the standards be tightened up to the extent that less discretion was to be left to the particular judge.

Furthermore, the changing of the word from "should" to "shall" is explained by comments in the House Committee Report:

> "The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. *See Edwards v. United States*, 334 F.2d 360 (5th Cir. 1964). Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit.' Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system."

More importantly, however, it seems to me to be clear that both the Code and the new § 455, which now speak in the same terms, has set up a standard involving the reasonableness of the belief or fear of the litigant rather than the reasonable likelihood of the existence of actual lack of impartiality. It will be noted that the language speaks in terms of the judge's impartiality being reasonably "questioned." It does not speak in terms of his partiality being reasonably likely to exist. Moreover, in the Committee Report the following language makes clear, it seems to me, that we are dealing with the reasonableness of the litigant's belief or fear of the existence of bias rather than the reasonableness of the claim that bias actually exists:

> "Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial."

By clearest implication, it seems to me that this language says that the standard must be whether the litigant has a "reasonable fear" that the judge will not be impartial.

The use of the terms "objective" and "subjective" are somewhat confusing in this context. I agree that there must be an objective determination as to whether the facts and circumstances fairly support the litigant's belief or fear that there is a lack of impartiality. To this extent it is an objective test.

Under this test, therefore, I would have no doubt but that the affidavit in this case, considered in connection with the transcript of the hearing, which is proper in that it was attached as an exhibit to the affidavit, meets the test. We must bear in mind when we consider the facts alleged that what the whole case is about was the allegations that the defendants had intentionally discriminated in the conducting of bar examinations, the only means by which black applicants could become members of the Alabama Bar. Thus, the significance of each of the several facts, and the effect of their accumulation is what we should bear in mind.

Here, we have a challenge to the judge assigned to try this case alleging discrimination on account of race in the grading of bar examinations on the basis of the following factual setting: the lawyer for the plaintiffs and counsel for the defendants had held conversations off the record in the judge's chambers, apparently discussing the doubts that were in the minds of plaintiffs.[2] At this time no affidavit under § 144 had been filed. In effect, plaintiffs were undertaking to develop a basis for determining whether to file such an affidavit. The hearing conducted was in the form of questions and answers put to the judge by Mr. Clemon, counsel for the plaintiffs. This hearing developed the fact that the judge had been president of the Montgomery Bar Association shortly prior to being appointed to the bench and that at the time the rules of the Association forbade admission of black lawyers. When comment had been made in the public press about this fact and of Judge Varner's being considered for appointment to the United States Court, he appointed a commission to review the bar association by-laws, but gave no direction or recommendation that the racial restrictions be changed. They were subsequently changed, at a time which the judge thought was during his term of office; but as to this he was not certain.

We are not considering here merely former membership by the judge in a club or other social organization having restricted membership. We are concerned with a challenge to a judge who shortly before his appointment had been president of the bar association of the state's capital city, 50 years after the State Bar of Alabama had become, by law, the organized state bar. *See* Alabama Code Recompiled, Title 46, § 21 *et seq.* It is not difficult to perceive the likelihood of a non-lawyer's confusing the status of the Montgomery Bar Association and its relationship with the State Bar of Alabama.

The additional grounds asserted in the affidavit as to the judge's relationship to the defendants cannot, it seems to me, be likely overlooked because of prior decisions of this Court that an allegation that a judge was on a friendly basis with one of the witnesses expected to testify was not sufficient. Such was the case of *Simmons v. United States*, 89 F.2d 591 (5th Cir. 1937). Here, Judge Varner was acquainted with ten of the thirteen defendants who were members of the Board of Bar Examiners, three only slightly and several on a basis of what he considered friendship. Three of them he did not know at all. When asked as to the effect of his acquaintance or friendship with defendants in the event of a possible conflict in testimony in the anticipated hearings, Judge Varner, indicated a strong feeling of confidence in the veracity and trustworthiness of his

2. The transcript shows the following:

"Gentlemen, you may want to have a seat at counsel table. I asked my court reporter to stay here this morning because. Mr. Clemon, (counsel for plaintiffs) I thought perhaps you would like to put some elements of our conversation on the record in regard to our question of whether or not I should recuse myself. I will have to say that I decided in cases earlier this week that these courts have been very reluctant about letting judges recuse themselves and I have really changed my attitude about it in the last two or three weeks. *Heretofore, I had felt that a judge should recuse himself very quickly because it made the court appear more fair, but there are other obligations that the court owes and I am afraid that I shan't recuse myself* but I want to give you an opportunity to put anything on record that you would like to put on record." [Emphasis supplied.]

friends. When asked expressly with respect to Mr. Scott, who had previously been secretary of the commission, and thus the one person who had custody of all of the documents, he expressed similar confidence in his likely credibility, noting that "if [Scott] appeared to evade I think I could detect it."[3]

The opinion of the Court proceeds on the theory that Judge Varner should not be faulted for answering honestly that he had a strong feeling of confidence in the veracity and trustworthiness of his friends. Of course, no one can take exception to the judge's answers to the inquiry. The point is that if a trial judge already has sufficient contacts with litigants who are to testify before him that he is compelled to answer truthfully that he already has a belief that they will be likely to tell the truth, the solution of the problem is not for him to refuse to answer or to hedge in answering a question but to recuse himself on the ground that one of the ingredients in the making of the final judgment will be matters dehors the record, that is, those qualities of friendship which have resulted in the judge having understandably a feeling of confidence in the veracity of the witnesses who are his friends. Of course, the judge answered the question in the only way he could. The problem arises from the fact to which he testified in making his answer; that is, that the affiants entered the litigation with at least a predilection in the judge's mind of favoring the veracity of opposing parties.

In sum, it appears to me that the combination of the facts alleged in the affidavit satisfied the requirements of § 144. Whether either one of the allegations standing alone would have been sufficient it is not necessary for me to decide. In addition to concluding, as I do, that the allegations in the affidavit were sufficient, it is more than clear that, even though the trial court should have adopted what the court now states to be the proper standard he did not even do that. He failed in two respects. In the first place, his statement quoted above clearly shows that he followed the theory of a "duty to sit," which clearly has been now eliminated under § 455. In the second place, he merely decided the question of bias *vel non* rather than attempting to determine whether the affidavit was or was not sufficient by any standard.

Especially in light of the recent enactment of the amendments to § 455 it seems peculiarly inappropriate for an appellate court to take away from the trial court the opportunity to determine whether under the provisions of this newly enacted statute he should recuse himself because of his consciousness that "his impartiality might reasonably be questioned." This is an inquiry which, it seems to me, Congress clearly meant to have the trial judge make for himself. He is best able, under standards which are entirely new since the matter was before the trial court, to weigh the allegations of fact in the affidavit in connection with the particular lawsuit then pending before him and make a determination as contemplated under § 455. It seems to me that it is not our place to substitute our judgment for that of the trial court in the making of this initial determination.

3. It is of significance that none of these persons appeared to testify personally. The motion for summary judgment was based solely upon their affidavits. There, of course, were no opportunities to make any credibility choices by use of the normal standards available to a trial judge.

I think this is peculiarly required in this case, since the trial judge clearly indicated an inclination to recuse himself but for his idea of a "duty to sit."[4]

Thus, even under the standard of inquiry announced by the Court it seems inappropriate to me for the Court to decide for the trial judge whether the affidavit was "sufficient" within the contemplated of § 144, with the gloss which is placed upon it by the amended § 455.

I would reverse the determination by the trial court overruling the affidavit and send the case back either under a determination that the affidavit was sufficient or to permit the trial court himself to determine under the standards now announced for the first time by this Court whether the affidavit met the requirements of the statute.

WISDOM, Circuit Judge (dissenting):

I am in substantial agreement with Judge Tuttle's opinion. In particular, I would hold that, under *Berger* and the recent amendments to § 455, an affidavit alleging a judge's bias is sufficient if the facts alleged justify a reasonable belief on the part of the affiant that the judge may be biased. The principle involved is older than the concern Caeser had for Calpurnia's reputation.

I do not, however, attach the importance Judge Tuttle attaches to Judge Varner's acquaintance with ten of the thirteen defendants, with some of whom he was on terms of friendship. Any judge who has been an active practitioner and active member of bar associations knows and is probably friendly with most of his state's bar examiners. The plaintiff unquestionably was aware of this fact and that if it were a ground for disqualification every judge in a state could be disqualified. It is an unreasonable belief—if the plaintiff had the belief—that such a relationship between the district judge and the defendants might deprive the plaintiff of a fair trial.

4. See fn. 2, *supra*. "Heretofore, I had felt that a judge should recuse himself very quickly *because it made the court appear more fair.*" [Emphasis added.]

Opinion of the District Court, August 29, 1974

FREDDIE D. ROBINSON et al., Plaintiffs,

v.

UNION CARBIDE CORPORATION,
MATERIALS SYSTEMS DIVISION,

Defendant.

Civ. A. No. 7583-73-H.

United States District Court,
S. D. Alabama, S. D.

Aug. 29, 1974.

J. U. Blacksher, of Crawford & Blacksher, and Caryl P. Privett, Mobile, Ala., for plaintiffs.

Vincent McAlister, of Almon, McAlister & Ashe, Sheffield, Ala., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAND, District Judge.

This cause originated in this Court on March 15, 1973 when plaintiffs, Freddie D. Robinson, Thomas S. Austin, Jr., Willie L. Jones, Olney W. Lucious, III, Willie J. Mickles, Peter Reese, Jr., Paul Richardson, Cynthia Caldwell, Jerome G. Fitts and Ronald L. Coleman filed this action on their own behalf and on behalf of all other persons similarly situated, pursuant to Federal Rules of Civil Procedure, Rule 23, to secure protection and to redress de-

privation of rights secured by Title 42, U.S.C., Section 2000e et seq. and Title 42, U.S.C., Section 1981.

By Order of the Court on the 7th day of January, 1974, the Court held this cause was proper for a class action and the class was defined as:

> "Those black job applicants who had an outstanding job application at the time of the commencement of this cause and those black job applicants who have filed job applications since the commencement of this cause and all future black job applicants, along with all current black employees of defendant, Union Carbide Corporation, Materials Systems Division."

After extensive discovery, a Pretrial Conference was held wherein the questions to be determined by the hearing were delineated. Though these triable issues were reduced to five in number covering a fairly wide range of alleged discriminatory practices, the main point advanced throughout the entire course of this litigation, both in arguments on motions, in conference, and upon the trial itself, was the expressed desire of the plaintiffs' counsel, through the aegis of this class action, to establish a new requirement of law, to become applicable nationwide, relative to the hiring practices of industry as they deal with minority employment problems; viz., whether or not the rule established, or fastly becoming so, that industry must demonstrate a ratio (quota) of minority to majority employees commensurate with that in the labor market available, failing in which there is prima facie discrimination, is the appropriate rule, or whether or not the better rule would be that the employment ratios (quotas) must equal the application ratios. Translated to the case at hand, it was

argued that where it is shown that as to the hourly rate employees, 26 percent were black and 74 percent were white, closely paralleling the work force ratio in the Mobile area, there was invidious discrimination being practiced by the employer because the application ratio was more nearly 50-50, and unless the employment practices were or are such as to accomplish this ratio in employment, it is prima facie that the employer is practicing racial discrimination.

Where counsel may now urge strongly the other points raised, this Court was pressed over and over again that the application ratio to hiring was what counsel desired to establish by this action; therefore, this was the desired relief sought by the class.

This record also shows, with unabashed frankness, the limits employed by the plaintiffs representative in utilizing the courts to establish pet theories. In the not too distant past it was considered by law schools, the Courts, and the legal profession as a whole that solicitation of litigation was unethical. One of the reasons advanced for this "growing more antiquated" theory was that the law favored compromise, not the stirring up of controversy.[1] In this instance, the Legal Defense Fund sent runners, now called "investigators", into this area to determine the conditions of employment in various industries and to seek out and encourage those who were reluctant to participate by representing to them that it would cost them no dollars to do so, either by way of attorneys fees or in expenses, and might result in dollars in their pockets if successful. Those who could be so persuaded were referred to associate coun-

---

[1] One would assume from the Judeo-Christian theory of "Blessed are the peacemakers".

sel who would then undertake to represent them in this endeavor.

Though there are viable theories and approaches to the redress of grievances in this type situation sanctioned by historic experience, the modern art of the law is set to encourage solicitation of business by clothing the "solicitors" with the grand name of "private attorneys general" whose duty it is to encourage controversy and to seek out and redress wrong.[2] What perfidy.

---

[2] Code of Ethics, Alabama State Bar Association, December 14, 1887:

"DISREPUTABLE TO STIR UP LITIGATION.

"20. It is indecent to hunt up defects in titles and the like and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring up strife and litigation is forbidden by law, and disreputable in morals."

Canons of Professional Ethics of the American Bar Association:

"28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENT.

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred."

"42. EXPENSES OF LITIGATION.

"A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation: he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."

See annotation 139 A.L.R. 620.

Again translated to the case at hand, we have an industry whose number of minority hourly employees is in proportion to the available labor force, yet they are sued to establish a new concept of what the law should require, as conceived by some pronouncement from a shrouded Olympus, and to be wrought from the courts by the solicitation of a clientele as a needed vehicle. Again we lament, there is obliged to be a better solution to establish a new law than by legislative and/or court sanction of the destruction of the high quality of the legal profession. What tragedy that lawyers and the courts allow themselves to be used in transforming the legal profession from that of a true profession to that of a business. It is indeed with sad heart that we bid a fond farewell to what was once the legal definition of the words "champerty" and "barratry".

• • •